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ABSTRACT

Issues concerning excellence in education and the 1985 strike at Yale University are considered in 27 conference papers. Topics include: a faculty and chancellor's perspectives on achieving excellence, employment discrimination, collective bargaining in community colleges, retirement issues, and campus bargaining and the law. Titles and authors are as follows: "Excellence in a Time of Paradox" (E. K. Fretwell, Jr.); "Unionization and Academic Excellence" (Ernst Benjamin); "Academic Reform and the Decade Past" (Irwin Polishook); "A Chancellor's Perspective" (William Monat); "Excellence: The Leadership Factor" (E. Gordon Gee); "The Cornell Experience" (Joan Roos Egner); "The CUNY Experience" (George Maginley); "Mutually Beneficial Collective Bargaining in a Community College" (Stuart Steiner); "The Massachusetts Community College System" (James F. Rice); "The Philadelphia Community College System" (Karen R. Schermerhorn); "By Whose Right? Management Rights and Governance in the Unionized Institution" (Margaret K. Chandler, Daniel J. Julius); "Retirement Planning Climate in the 1980s" (David W. Carter); "Legal Issues Affecting Retirement" (Ann H. Franke); "Early Retirement: The 1983-1984 Experiences of the State University of New York" (Thomas M. Mannix, Nick J. Paradiso, Jr.); "Labor Relations Issues and Their Effect on Collective Bargaining" (Nicholas DiGiovanni); "Discrimination Issues and Their Effect on Collective Bargaining" (Stuart H. Bompey); "Labor Law and the Question of Traditional Government Functions" (David E. Poisson); "The Union Perspective [on the strike at Yale]" (John Wilhelm); "Administration Perspective [on the Yale strike]" (Linda Lorimer); "A Faculty Perspective in Support of Local 34 [at Yale]" (Jack McKivigan); and "A Faculty Perspective in Support of the [Yale] University Administration" (Donald Kagan). (SW)

UNIONIZATION AND ACADEMIC EXCELLENCE

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Proceedings
Thirteenth Annual Conference
April 1985

JOEL M. DOUGLAS, *Editor*

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National Center for the Study of
Collective Bargaining in Higher Education
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I. INTRODUCTION

INTRODUCTION

Two themes were evident as we planned the program for the Thirteenth Annual Conference; first, and perhaps foremost, the continued drive to achieve excellence in education and second, the strike at Yale. Both topics had received substantial media coverage and were subjects that the faculty planning committee thought we should address. Arranging presentations for the second topic proved to be the easier task in terms of logistics. We received full cooperation from both the provost's office at Yale University and Local 34 of Hotel and Restaurant Employees Union. Additionally, faculty from Yale representing both perspectives also indicated a willingness to present their views. The "Excellence in Education" issue proved more difficult to organize as distinctions had to be drawn where the excellence equation could be juxtaposed upon collective bargaining and unionized employment relationships. Once we overcame those problems, we began to structure the conference around these issues.

DESIGN OF THE CONFERENCE

With the overall conference themes in place, we began to assemble the various component parts of the program. Our main goal concerning the excellence equation was hearing from chancellors and presidents of universities and faculty unions who had experience within unionized and nonunionized settings. Three chancellors presented papers on this topic. E. K. Fretwell currently at the University of North Carolina at Charlotte and formerly with CUNY, Bill Monat, the Chancellor of the Illinois Board of Regents System and formerly at Baruch College and Gordon Gee, the President of West Virginia University, in route to the Chancellorship of the University of Colorado, all shared their thoughts on the excellence equation and how best to achieve and maintain educational quality. The faculty perspective on excellence was advanced by Ernst Benjamin, the General Secretary of the AAUP and Irwin Polishook, the President of the PSC of CUNY.

Three topics were selected for further study inasmuch as the excellence equation impacted directly on them. The first addressed the following question: How can excellence be achieved if the rights of management are blocked or limited by the collective agreement? This problem was addressed by Margaret Chandler and Dan Julius, two widely recognized scholars in the field of academic collective bargaining and management rights.

The issue of faculty retirement and its impact on excellence was the second corollary issue that we examined. To explore this question, we invited a vice president from TIAA/CREF, the major holder of faculty retirement programs, an attorney from the AAUP who had litigated numerous retirement issues and an Associate Vice Chancellor of Employee Relations, who has had practical experience with this problem in two major university systems, to share their views. Dave Carter from TIAA/CREF, Ann Franke from AAUP and Tom Mannix from SUNY led the participants through the complexities of the retirement issue and its role both in achieving excellence and in the collective bargaining environment.

The question of employment discrimination was the third topic that we addressed. Two experienced university administrators, one an affirmative action officer and the other an associate provost, explored the issue of employment discrimination from the perspective of both the unionized and nonunionized university. Joan Egner, an Associate Provost at Cornell and George Maginley the Affirmative Action Officer for the City University of New York presented their experiences in this area.

A major feature of the conference and a major feature of the year was the strike by the support staff at Yale. We wanted to hear from those who actually participated in the strike and have them share with us their views as to the causes, nature and outcomes. As Linda Lorimer, the Associate Provost of Yale stated, it was a local issue that became a national strike. She, along with Donald Kagan of the Department of History, presented the viewpoint of the administration and faculty members who did not support the strike while John Wilhelm of Local 34 and Jack McKivigan of the faculty presented their perspectives in support of the strike. This session was especially significant for it raised the dual questions of strikes at universities and colleges and the obligation of faculty to back a strike of the support staff.

As in the past, one topic was selected for a symposium. Collective bargaining for community college faculty was this year's choice and under the direction of a community college president, Stu Steiner from Genesee Community College and two faculty leaders, Jim Rice, President of the Massachusetts Community College Council, and Karen Schemerhorn, Co-President of the Community College of Philadelphia, papers were presented and discussed on the significant issues and problems facing this group.

This year's conference also contained, what has now become two standing presentations, the annual collective bargaining update presented by me (a task I thoroughly look forward to at each conference) and the annual legal review which this year was shared by Messers. DiGiovanni, Bompey and Poisson. The legal review has become virtually a requirement for those who wish to keep abreast of the significant developments in the field while the collective bargaining presentation offers a national perspective on what one's colleagues are doing in the field of academic collective bargaining.

THE PROGRAM

Set forth below is the program of the Thirteenth Annual Conference of the National Center which lists the topics and speakers included in this volume of the Proceedings. Some editorial liberty was taken with respect to format and background material in order to ensure readability and consistency.

MONDAY MORNING, APRIL 29, 1985

8:30 REGISTRATION AND COFFEE HOUR

9:30 WELCOME
Paul LeClerc, Provost, Baruch College, CUNY

COLLECTIVE BARGAINING UPDATE: 1985
Joel M. Douglas, Director, NCSCBHEP

10:00 KEYNOTE SPEECH

Topic: EXCELLENCE IN A TIME OF PARADOX

Keynote Speaker: E. K. Fretwell, Jr., Chancellor
University of North Carolina
at Charlotte

Moderator: **Robert Birnbaum**
Prof. of Higher Education
Teachers College, Columbia Univ.

11:15 PLENARY SESSION "A"
A FACULTY PERSPECTIVE ON ACHIEVING EXCELLENCE

Speakers: Ernst Benjamin
General Secretary
AAUP

Irwin Polishook
President, PSC/AFT/AAUP

11:15 PLENARY SESSION "B"
A CHANCELLOR'S PERSPECTIVE

Speaker: William Monat
Chancellor
Illinois Universities Board
of Regents

1:00 LUNCHEON

Topic: EXCELLENCE: THE LEADERSHIP FACTOR

Speaker: E. Gordon Gee, President
West Virginia University

Presiding: Frederick Lane
Professor of Public Administration
Baruch College, CUNY

MONDAY AFTERNOON, APRIL 29, 1985

2:30 SMALL GROUP SESSIONS

2:30 GROUP "A"
EMPLOYMENT DISCRIMINATION ISSUES

Speakers: Joan Egner
Associate Provost
Cornell University

George Maginley
University Affirmative Action
Officer, CUNY

Moderator: Esther Liebert
Asst. Administrator, Employee
and Labor Relations
Baruch College, CUNY

2:30 GROUP "B"
SYMPOSIUM ON COLLECTIVE BARGAINING IN
COMMUNITY COLLEGES

Speakers: Stuart Steiner
President
Genesee Community College

James F. Rice
President, Massachusetts Community College Council, MTA/NEA

Karen R. Schermerhorn
Co-President, Faculty Federation of Community College of Philadelphia/AFT

Moderator: Samuel Ranhand
Professor of Management
Baruch College, CUNY

2:30 GROUP "C"
BY WHOSE RIGHT? MANAGEMENT RIGHTS AND GOVERNANCE IN THE UNIONIZED INSTITUTION

Speakers: Margaret K. Chandler
Professor, Graduate School of Business, Columbia University

Daniel J. Julius
Director, Employee Relations
California State University

Reactor: G. Terry Madonna
President
APSCUF

Moderator: Frances Barasch
Professor of English
Chairperson, Baruch Chapter
PSC/AFT/AAUP

TUESDAY MORNING, APRIL 30, 1985

9:30 PLENARY SESSON "C"
RETIREMENT ISSUES IN ACADEMIC COLLECTIVE BARGAINING

Speakers: David W. Carter
Vice President
TIAA/CREF

Ann H. Franke
Assoc. Sec'y. and Assoc. Counsel
AAUP

Thomas Mannix
Associate Vice Chancellor,
Employee Rels., SUNY

Moderator: Theodore H. Lang
Professor of Education
Baruch College, CUNY

11:15 **PLENARY SESSION "D"**
CAMPUS BARGAINING AND THE LAW: AN UPDATE

Speakers:
Nicholas DiGiovanni, Esq.
Morgan, Brown & Joy
Boston, MA

Stuart H. Bompey, Esq., Chairman
Section on Personnel Relations
National Assoc. of College and
Univ. Attorneys, Washington, D. C.

Reactor:
David Poisson, Esq.
Coordinator of Higher Education
NEA

Moderator:
Joyce E. Barrett, Esq.
Baruch College
PSC/CUNY Office of Legal Affairs

TUESDAY AFTERNOON, APRIL 30, 1985

1:00 LUNCHEON SYMPOSIUM

Topic: THE STRIKE AT YALE

Speakers:
John Wilhelm
International Vice President
New England Hotel and Restaurant
Employees International, AFL-CIO
Chief Negotiator, Local 34
Federation of University Employees

Linda Lorimer
Associate Provost
Yale University
Member, Negotiating Team

Jack McKivigan
Professor of History
Yale University

Donald Kagan
Professor of History
Yale University

Moderator:
Aaron Levenstein
Professor Emeritus
Baruch College, CUNY

3:30 SUMMATION AND ADJOURNMENT

Joel M. Douglas

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, City University of New York, it addresses its research to scholars and practitioners in the field. Membership

consists of institutions and individuals from all regions of the U. S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- The two-day Annual Spring Conference
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an Annual Directory of Faculty Contracts and Bargaining Agents.
- Bibliography of Collective Bargaining in Higher Education.
- The National Center Newsletter, issued five times a year, providing in depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.
- Monographs - complete coverage of a major problem or area, sometimes of book length.
- Regional workshops, using a hands-on format to provide training in subjects like negotiating a contract, grievance-processing and arbitration, implementation and administration of contracts.
- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.
- Depository of arbitration awards in higher education housed at the National Center and established with the cooperation of the American Arbitration Association.

ACKNOWLEDGMENTS

This publication of these Proceedings marks an interesting passage for the Center for it is the first publication to be produced without the assistance of Evan G. Mitchell, the longtime administrative coordinator of the Center who left the Center in October for another position at Baruch College. Evan has played a role in the production of every publication that the Center has produced until this one and her knowledge, talent and all around skill was missed.

The major production burden fell on Ruby Hill, another long-term member of the Center's staff, who, as she has done so admirably in the past, carried on with her usual level of excellence. In addition to transcribing the various papers, Ruby became the reservoir of all knowledge associated with this project. Beth Hillman, our new administrative coordinator, joined us in late 1985 and this project became her first Center publication. She worked long and hard making sure that all the pieces fit. Proofreading was coordinated by Beth and done by two graduate assistants, Michael Blumenthal and Liz Kotch.

Others who assisted were Jeannine Granger, who transcribed several speeches from audio tapes.

It has always been a delightful task designing the program for the Annual Conference; delightful inasmuch as I get to share ideas and gain valuable insight and information from Aaron Levenstein.

For any errors or omissions, we apologize. For the success of the project and the conference, we thank our supporters.

The Proceedings are a team project. To the team members cited above, I express my thanks and gratefully acknowledge their assistance.

J. M. D.

EXCELLENCE IN A TIME OF PARADOX

E. K. Fretwell, Jr.
Chancellor
The University of North Carolina
at Charlotte

INTRODUCTION

Many people who have not read Charles Dickens A Tale of Two Cities since high school (if then) still recall the familiar reference: "It was the best of times, it was the worst of times." Wherever you participants of this important conference find yourselves on the good news/bad news continuum, I think we can all agree that we in the higher education community live in a time of paradoxes.

My purpose today is not to concentrate particularly on collective bargaining—others with more recent experience will do that very shortly—but to describe some of the trees in the higher education forest as well as the forest itself. As we continue to strive individually and collectively in our search for excellence in the university world, it's important to focus on seven major paradoxes. I will also provide suggestions for making these paradoxes productive, or at least bearable. Whether faculty or administration, labor or management, or some interesting mixture thereof, we who seek excellence in higher education learn to live and practice our craft creatively in the midst of these paradoxes, most of which are likely to continue in one form or another for quite some time.

THE SEARCH FOR EXCELLENCE: MAJOR PARADOXES

A. Definition of Excellence

Excellence is almost like the weather. We talk about it a lot but have trouble defining it. Kenneth Mortimer, chair of the widely read National Institute of Education report Involvement in Learning, reminded a recent national audience of university trustees that three commonly held views of excellence leave much to be desired. Higher institutions are reputed to be excellent when they have (a) great student selectivity with high SAT's, (b) a generous endowment and other financial advantages, and (c) an everybody-says-they're-good reputation (often associated with age or conceivably depth and height of ivy). These, Mortimer points out, are elitist and directly or indirectly condemn the open door concept so closely related to important social and economic mobility. Real definitions of excellence must concern how much students

learn and how effectively they learn. How do people and programs actually perform? The "value added" concept makes good sense here.

John W. Gardner, founder of Common Cause and of Independent Sector, in his excellent book entitled Excellence suggests that while standards of performance in our work and in our lives are always essential, we must couple with this a deep concern for individual fulfillment. We must accept as an all-encompassing goal, Gardner declares, "the furtherance of individual growth and learning at every age, in every significant situation, in every conceivable way". These words of almost 25 years ago are in no way dated but are today more true than ever, especially when one looks at the demography of the U. S. population and the ethnic, economic, geographic and possibly political changes anticipated between now and, say, the year 2001. Our population is becoming significantly older, less white, and less English-speaking.

We must respond to the paradox of any limited definition of excellence by clarifying institutional goals and seeing how close we come to meeting those that make sense.

B. The Role of Government

What a strange mixture: less support and more attempts at control! At the same time that Secretary Bennett of the U. S. Department of Education is energetically at work stripping back various student aid programs, crying for divestiture and suggesting that the federal government move toward getting out of significant aspects of university support, legislators at both the national and state levels are proposing to define by low standards of eligibility and even basic admission requirements.

In regard to the matter of "satisfactory progress" to remain eligible for existing federal financial assistance to students, some leaders on Capitol Hill apparently believe that the Congress should make definitions. In one sense they are right, but only if we in the higher education community fail to convince both ourselves and the general public that self-regulation can and does work. Since December 1981, through the statement of the American Council on Education on Satisfactory Academic Progress to Maintain Financial Aid Eligibility, we have had a reasonable set of criteria.

To get immediately to the point, accountability by institutions must become more than a buzz word. Toward that end, the Council on Postsecondary Education (COPE) adopted a resolution again urging the Federal government not to usurp the major self-regulating function of colleges and universities. COPE may also encourage accrediting bodies to continue to refine and enforce their own policies regarding satisfactory progress.

On the subject of accreditation, a significant example of self-scrutiny by the higher education community, it is timely that the university world and the public in general become more aware of ways in which both the regional and professional accrediting bodies seek to encourage quality in the programs they evaluate. If the new national desire for excellence indicates a need for something resembling quality control, the choice is clear. We either use and improve voluntary evaluation processes, or face the twin hazards of extensive government scrutiny, on the one hand, or no broad scale attention to quality whatsoever, on the other. (There's certainly nothing new about my statement today, but it needs saying again.)

C. What Does Opportunity Really Mean?

Writing in the Carnegie Foundation report entitled Three Thousand Futures, Clark Kerr states very clearly that compared with the United States "no other nation so embraces open-access higher education". That was in 1980. Only five years later, however, we find that in the name of quality, increasingly higher requirements and sometimes new examinations are being proposed—and sometimes mandated—for college admission, high school graduation, athletic eligibility, upper division status, minimum qualification to teach in public schools, and other areas.

So the question must be again: Can we have excellence and opportunity at the same time? This is one of the hardest paradoxes to address. In our society, I say the answer has to be YES. The challenge is how to do it. At the risk of oversimplification, I suggest approaches such as the following which include higher education working hand in hand with the schools—public and private—from which our students come:

1. Use the increasing college entrance requirements to make the senior year for high school students challenging and filled with "solid" subjects.

2. Emphasize through effective advising, at least as early as junior high, the importance of sequential progress in such fields as (but not limited to) English composition, mathematics and science, and, for some, foreign languages.

3. Improve the quality of teaching and the sequential nature of learning in both high school and college by penetrating what Charles Keller of the College Board long ago called the sheep-skin curtain.

4. Support for community colleges must be enhanced. So-called late bloomers and persons with deficiencies to overcome often find the positive community college approach advantageous. Two plus two transfer (a matter of considerable importance long ago when I was on the staff of CUNY) is an approach which needs continuous stimulation. Other programs in both colleges and in other institutional settings must help present and future students develop tangible skills and also enhance self-concept.

5. While all of this is going on, stimulaton of the more gifted students should also take place. In our university, as a result of especially dedicated faculty members, honors programs have been developed without significant budget increases.

D. Liberal Education in a Time of Vocational Drive

If students vote with their feet and our budgets are enrollment driven, what happens to any hope of the much-touted liberalizing of students by involvement in the arts and sciences?

No consideration of this quandry is complete these days without mention of at least three reports:

1. Involvement in Learning (National Institute of Education report) Mortimer

2. Integrity in the College Curriculum (Association of American Colleges)

3. The National Endowment for the Humanities Report (issued by William Bennett last November)

I shall not summarize these reports for you. Many of you are familiar with them already. Read them for yourselves or, as a starter, at least read the coverage they've received in The Chronicle of Higher Education. The humanities report has been characterized by at least one observer as "nostalgic and elite," and there are other charges that could be leveled. Higher education certainly deserves some sort of prize for the amount of breastbeating and mea culpa approaches which we often take. Not all is bad, yet much remains to be done. While some aspects of the reports may be viewed as self-seeking, the importance of the humanities—to cite but one example—should not take a bum rap just because we may occasionally disagree with some of Secretary Bennett's statements.

Study the reports coolly and seriously. If they say something to your institution, weigh the message and see what can be done.

The NIE/Mortimer Involvement in Learning report sounds certain clarion calls. Among them:

1. Allocation of more resources to first- and second-year undergraduate teaching and support services.

2. Use of active modes of teaching that require students to take greater responsibility for their learning.

3. Development of a statement of the knowledge, capacities, and skills that students must develop prior to graduation (and use of it).

4. Two full years of liberal education as a part of every bachelor's degree.

5. Interaction of knowledge from various disciplines, with attention to development of capacities of analysis, problem solving, communication, and synthesis.

(These are but five of 27 important recommendations!)

Faculties themselves have major responsibility for encouraging and even requiring a commitment to undergraduate education which is truly liberal and liberating (to use the concept encouraged in a recent report edited by Zelda Gamson of the University of Michigan). As long as faculties claim major control over the curriculum as well as content and method in individual department and courses, opportunities abound for major steps forward.

At our university, the then President of the Faculty, a veteran professor of chemistry, came to me four years ago urging that together we appoint a task force to examine and then describe qualities and experiences which our graduating seniors should exemplify and which we should require them to have. Out of this came commitment, clarification of goals, hard-nosed compromises, acts of faith, and a university-wide General Education Committee with significant powers to approve new and modified courses and concepts. The idea of required writing-intensive courses available in, but not limited to, the English Department is worthy of special mention.

E. Wither the Faculty?

As I have just attempted to indicate, the faculty are at the heart of the matter in the resolution of many of the seven paradoxes under consideration. But the multiple roles of the faculty themselves can become paradoxical.

Professor Howard Bowen of the Claremont Graduate Center recently attempted to answer the question: Are members of the American professoriate becoming an endangered species? While he did not come down clearly on the affirmative, he did raise itchy concerns, some of which we need to consider. Among them are "a deteriorating work situation" involving not only a drop in real pay ("even worse than school teachers"), but also difficulties in support systems, less effective preparation of students in high school, some understaffing, more part-time students, petty aggravations, and a sense of "stuckness" now that mobility from one campus to another is less than it once was.

Bowen also cites the continuing attractions of the profession in terms of fascination with ideas, opportunities for self-expression, scholarship, and the "instinct of (good) workmanship. . . ." While there may be slippage of status on public-opinion scales, there is still approbation for college teachers. Bowen, an economist, closed a recent talk before the Association of Governing Boards with the thought that we need to do something about the reward inequities among various teaching fields. He also observed that in the U. S. we have "one of the lowest tax burdens of any of the industrial countries" thus suggesting the theoretical possibility of more tax funding for higher education.

Assuming all of the above is true, it's still easy to dream of the days of a world of forums and academies—take Athens if you wish—where there was little, if any, overhead expense and almost all resources would flow through to those involved directly with the teaching/learning process. I have a colleague, a somewhat seasoned faculty member, who objects to the use of the term "management" in regard to the university. If I could figure out how to do it, I'd be pleased to cut back on the costs of administration, plant and utilities management, garbage and snow removal (much less in North Carolina than in Buffalo), the costs of either winning or losing lawsuits, campus police, affirmative action, emergency roof repair, barrier-removal for the handicapped, and other absolutely necessary but non-intellectual aspects of operation of a modern university.

I commend the role of faculty involvement in the major academic decisions of university operation and am happy when there appear to be signs of greater understanding of the totality of the institution, its people, and its needs. Our current faculty president is remarkable in being able to "see the big picture" and to encourage his colleagues to do likewise. Those of us who are administrators need to learn how to work with, without attempting to co-opt, good faculty leadership.

But if faculty—especially senior faculty—wish to have a big piece of the action, they might do well to understand the total picture, the demands on and limitations of the entire budget, and the fact that there is a desk where eventually the buck has got to stop.

Do faculty really want to become administrators? Or are we finally arriving at a point where respective roles are, once again, becoming a bit more clear?

F. How and Where Should Higher Education Take Place?

Here we find some interesting contradictions:

1. Side 1 — It's important that we have a closely knit learning community of students with similar preparation who will live and study together on campus. This will take four traditional years, but it will prepare them for the rest of their lives.

   Flipside — The students of the future will be older, more diverse in backgrounds and interests, will have multiple time commitments as a result of jobs and families, will frequently enroll part-time, and would be pleased if instruction is delivered at a place closer to where they are rather than where the campus happens to be. They may wish to go in and out of recurring education for a large part of their lives.

2. Side 1 — Basic general education and a core of required studies should be taken in the first two years of college, to be followed by an increasingly specialized course of study leading to a highly focussed major to prepare for graduate work in the field. (Even though most students don't go on to graduate school).

   Flipside — Many older students with experience with real life might wish broad liberal or general studies major, and don't want to limit themselves to any specialization track. This is especially true for those wanting an "upside down" curriculum, since often they may be community or technical college graduates who had two years already which were career focussed with few, if any, electives.

3. Side 1 — All degree-granting higher education should be in the hands of recognized, relatively traditional colleges and universities of the non-profit type with which most of us are quite familiar. Faculty should be largely full-time and engaged in academic careers along established lines.

   Flipside — Take a look at the Carnegie Foundation report by Nell Eurich entitled Corporate Classrooms. According to Ernest Boyer's introduction, some $40 billion is already being spent by business corporations to train and educate their employees, in such modes as in-house educational programs, educational and training facilities, corporation-owned-and-operated institutions (Rand Ph.D., Wang and Arthur D. Little M.S. programs, to name but a few), and the satellite university approach (such as the National Technological University in Fort Collins, Colorado). Corporate classrooms already enroll some eight million persons right now, but this number is surely slated to grow.

There are messages here in all of these examples. I don't think I need to draw you any pictures!

G. What Kind of Top Leadership?

At a time of desire for excellence in higher education, what kind of institutional leadership is needed? What may we expect? Are there not some paradoxes here, too?

Once again, Clark Kerr epitomizes some of the problems in a few words. "Over the past 20 years," he notes in the Carnegie/AGB report Presidents Make a Difference, "the strength of the presidency . . . has been weakened". He describes it as "more barbed wire around smaller corrals" and lists at least 14 major reasons as to why the job is more difficult. (Frank Newman of ECS has been working, incidentally, on defining just some of these: describing ways of greater intrusion on state governments into the operational aspects of public universities).

Kerr also reports that it is now more difficult to get highly qualified persons to serve as presidents of colleges and universities than it was in earlier times—more specifically the early 1960's. "One major reason is that now only about one-half of top academic officers (the one greatest single source of new presidents) are interested in becoming presidents."

The ironies here are great. We strive for excellence. We expect more of chief executives. The leadership roles are made difficult, often arbitrarily by requirement of time and effort by the incumbents in matters not directly related to the improvement of educational programs. Many well-prepared people aren't interested, and no wonder. What to do?

If I had a complete and clear answer to questions such as these, probably I should hang out a shingle and become one of the busiest consultants of our time. I have no panaceas, but I'll share a few possibilities. We should encourage:

1. Enlightened appointments of trustees by governors and whoever else controls appointments.

2. Rewards to institutions which demonstrate effective results. It is time to provide some sort of "value added" measure, as suggested above. Should state agencies exert the same amount of detailed supervision over campuses which have good proven fiscal practices, in contrast with those with less effective procedures?

3. Clear understanding between boards and chief administrators as to what's policy and what's administration. There should be clearer relationships between campuses and central offices of university systems. Again, campuses with good track records would be given more freedom and leeway.

4. More effective selection procedures for university CEO's and opportunity for chief administrators to appoint highly competent supporting officers. Good salaries and fringes are important. Problems raised by excessive "sunshine laws" are well known but not necessarily solved.

5. Frequent and varied opportunities for heavily laden CEO's and other administrators for intellectual and professional refreshment.

I could go on, but this is probably enough!

CONCLUDING REMARKS

In looking at the prospects of achievement of more excellence in the future of American higher education, I've attempted to identify seven areas which appear to present paradoxes—areas which appear to be somewhat self-contradicting. Let's look at them as challenges which could be solved. The seven pertain to:

1. Defining excellence.
2. Emphasizing self-monitoring rather than governmental controls.
3. Using a broad definition of opportunity.
4. Mandating liberal education in all undergraduate programs.
5. Understanding faculty roles.
6. Exploring various non-traditional roles for higher education of the future.
7. Enhancing campus leadership.

These are indeed seven vital areas worthy of our greatest attention. I hope that during this important conference on Unionization and Academic Excellence you will all move closer to positive solutions.

III. A FACULTY PERSPECTIVE ON ACHIEVING EXCELLENCE

A. UNIONIZATION AND ACADEMIC EXCELLENCE

B. ACADEMIC REFORM AND THE DECADE PAST

A FACULTY PERSPECTIVE ON ACHIEVING EXCELLENCE
A. UNIONIZATION AND ACADEMIC EXCELLENCE

Ernst Benjamin
General Secretary
AAUP

INTRODUCTION

Faculty regard their scholarship, teaching, and judgment as central components of academic excellence. Accordingly, they view the standards and welfare of their profession as a critical foundation. Collective bargaining, like other aspects of academic administration, is considered and evaluated in terms of its anticipated impact on professional standards and welfare.

FACULTY UNIONISM

Many faculty, especially among those who have not experienced bargaining, share the administrative view that unionization may impair excellence by sacrificing professional standards to short-term welfare. They worry especially that bureaucratic rigidity might supplant academic judgment, leveling might erode merit standards, and adversary conflict might replace collegial deliberation.

Those faculty who choose to bargain despite these concerns do so because they perceive unchecked academic administration as an even greater threat to professional standards and welfare. They fear particularly that managerial regulations will supplant academic judgment, market or formula criteria will overwhelm merit standards, and intrusive management will disregard collegial deliberation.

In their common critique of faculty bargaining, many faculty and administrators do share an express commitment to academic judgment, meritocratic standards, and collegial or shared governance. These common premises provide, therefore, standards for evaluating the actual impact of collective bargaining on the pursuit of academic excellence. They are, reciprocally, a basis for assessing the contribution of administration to academic excellence. Moreover, these premises are relevant to the faculty contribution to excellence regardless of whether excellence is viewed primarily in terms of research and graduate education or teaching and undergraduate education as in recent reports. On review of the evidence, I think that faculty and administrators concerned with the achievement of academic excellence will find little ground for their apprehensions about faculty unionism but serious grounds for concern about academic management.

Academic judgment is increasingly subject to formalized procedural regulation. The evidence indicates that this tendency is accelerated by collective bargaining. For example, written tenure and promotion procedures are substantially more prevalent at bargaining institutions.[1] But, the same finding confirms that tenure and promotion decisions remain matters of academic judgment. Collective bargaining has both enhanced procedural fairness and preserved academic judgment. On the other hand, increased centralization and uniformity of tenure decisions and standards by administrative action regardless of bargaining is a subject of serious concern in recent recommendations for academic reform.[2]

Faculty unions also seek to regulate progammatic decisions, especially those involving retrenchment. Research shows that unionized campuses are more likely to have formal retrenchment procedures. These regulations have not, however, created programmatic rigidity for unionized campuses are also more likely to have implemented program discontinuance resulting in faculty dismissal.[3] Contracts have increased some protections such as provision for retraining and reassignment of faculty and may be a response to rather than a source of retrenchment pressures, but they have certainly not furthered programmatic judgment.

Administrations employ retrenchment specifically in response to enrollment decline.[4] This violates both AAUP policy and academic criteria of decision making. It also points to a larger problem: the tendency of administrations, widely noted in recent reports, to adapt academic programs to short-term student demand.[5] Formula and enrollment-driven budgets, which administrators often extend from the legislative down to the departmental level, are certainly a graver threat to academic judgment than collective bargaining.

THE MYTH OF CONTRACTUAL LEVELING

Union efforts to protect professional welfare have led to some increase in rigidity regarding salary decisions. Unions do seek to guarantee periodic increases through step systems, cost-of-living provision and other formulas. Unions resist selective salary procedures. Union salary improvements relative to non-bargaining campuses are uncertain,[6] but a study just released by the College and University Personnel Association does allege a significant salary advantage for unionized faculty among public institutions.[7] What is clear is that faculty nationally have lost 20% of their purchasing power since the early 1970s.[8] A report published by the Association of Governing Boards finds that in the same period "of all higher education's expenditures, faculty salaries increased least".[9] Moreover, a study of higher education expenditure by function finds that in the years 1974-75 to 1980-81 instructional costs increased least (9.9%) and administrative expenses most (21.8%), even disregarding those administrative costs at the departmental level which are coded as instructional.[10] Managerial judgment has clearly replaced academic judgment regarding the centrality of faculty in the academic enterprise.

Correspondingly, academic standards of quality have been diminished by managerial hurdles, not contractual leveling. Baldridge and Kemerer have failed to find substantial evidence of leveling by collective bargaining.[11] But administrators at two-thirds of four-year institutions, regardless of bargaining, report that tenure and promotion is more difficult to attain due to deliberate administrative action. The same study reports that:

> The majority of staffing alternatives are not directed against the concept or practice of

> tenuring faculty but are directed toward maintaining or lowering the number of tenured faculty as a proportion of the total institutional faculty complement, in order to achieve greater flexibility.[12]

That is, increased tenure requirements have not been directed to a general increase in academic quality but to providing more room for non-tenure track and part-time faculty who compose more than a third of all full-time equivalent faculty. This is a major basis for the recent concern about the quality of undergraduate institutions.[13]

Union agreements are less likely to permit selective salary awards, although there is not any obstacle to negotiating such agreements and some 31% of university contracts include "merit" awards.[14] Union agreements with selective increments also allocate smaller portions of the salary award to discretionary increases. But do administratively determined selective increases go to "merit" or "market" increases? Although there is little systematic study, the tendency to develop radically disparate salary schedules for selected fields in response to external markets is widely recognized and has been described in a recent report.[15] Administrations seek to segment the market to hold down the general impact of competitive fields. In market terms, the administration ends up paying high salaries to individuals of mediocre ability in high-demand areas and low salaries to individuals of great ability in low-demand areas. This necessarily discourages long-term recruitment and retention of the more able in low-demand fields and gravely threatens campus collegiality as well.[16] Hence, union resistance is not only an effort to benefit collectively from marginal salary increments in high-demand fields, but to protect campus collegiality. Declining collegiality and concern for campus-wide issues is another frequent theme of recent reports.[17]

INCREASED COLLEGIALITY

Faculty unions have demonstrably reduced conflict and increased collegiality through orderly personnel procedures and fairer grievance processes.[18] Unions have not diminished and may have slightly improved collegial shared government through senates and committees independent of the bargaining agent.[19] There is no evidence of a general increase in conflict or reduction in collegiality due to faculty unionism. But academic management is systematically seeking to reduce the faculty role in governance. George Keller's popular work on "strategic management" complains that academic management is "in shackles" and commends the emergence of "intrusive" management.[20] The American Association of State Colleges and Universities has recently issued a statement on governance which sharply diminishes the faculty role from partners to one of a litany of constituencies.[21] Clark Kerr assigns the faculty, curricular advice and consent but asserts that "the basic responsibility must be assumed by the academic administration".[22] In short, administrations seek not to administer but to manage.

ADMINISTRATIVE THREATS TO EXCELLENCE

Faculty unions are alleged to increase the deplorable tendency toward centralization and external control of university affairs.[23] This is a particularly nasty example of blaming the victim for it is precisely the tendencies toward centralization and external intrusion on professional and collegial relations which faculty's organize to resist. But administrations seek flexibility precisely to achieve an accommodation with external demands:

> If educational institutions are to reverse, or at least slow down, the trend toward outside interventions in their affairs, they must shape their own destinies in ways that are acceptable to the public and its elected leaders.[24]

The recent critiques of higher education emphasize the extreme vocationalization of curricula which has resulted from excessive accommodation.[25]

In sum, fifteen years of faculty bargaining have produced no substantial evidence that bargaining has compromised academic judgment, lowered academic standards or fractured collegiality. But there is evidence of administrative subordination of academic to managerial judgment through centralized status decisions, enrollment driven formula budgeting, and diminished academic priority in expenditures. Administrations do erode academic quality by replacing tenure track faculty with non-tenure track and part-time appointees, and pursue salary tactics which discourage collegiality and long-term recruitment and retention of excellent faculty by excessive response to short-term market pressures. Administrations do seek to replace collegial deliberations with strategic or intrusive management which accommodates itself to external demands.

Faculty unions may be faulted for their limited success in resisting these administrative threats to excellence. But cooperative achievement of academic excellence requires shared recognition that the principal threats to excellence are external and managerial not from faculty or their union. The remedy must include improved professional standards and welfare either through bargaining or traditional AAUP policies, not further diminution of faculty standards and participation. For faculty excellence is in fact a necessary condition of academic excellence.

FOOTNOTES

1. J. Victor Baldridge, Frank R. Kemerer and Associates, Assessing the Impact of Faculty Collective Bargaining, AAHE-ERIC/Higher Education Research Report No. 8, 1981, (Washington, D. C.: American Association for Higher Education, 1981), p. 35. (This work, which includes both reports of the authors' research and a useful suvey of related findings, offers the best general summary of our current knowledge about faculty bargaining and a useful base for this discussion.)

2. Integrity in the College Curriculum: A Report to the Academic Community, (Washington, D. C.: Association of American Colleges, 1985), pp. 10-12; U. S. Department of Education, National Institute of Education, Involvement in Learning: Realizing the Potential of American Higher Education, Final Report of the Study Group on the Conditions of Excellence in American Higher Education, October 1984, pp. 50-51, 59-60 (hereafter cited as NIE).

3. Baldridge, op. cit., p. 44; Kenneth P. Mortimer, Annette Caruso, Marque Bagshaw, "The Project on Reallocation," an executive summary sponsored by the Center for Study of Higher Education of the Pennsylvania State University and TIAA/CREF, February 1985.

4. Mortimer, op. cit.

5. "'To Reclaim a Legacy': Text of Report on Humanities in Education," The Chronicle of Higher Education, November 28, 1984, p. 20; Clark Kerr, "Liberal Learning—A Record of Presidential Neglect," Change, September 1984, p. 35.

6. Baldridge, op. cit., pp. 6-7.

7. Richard M. Howe, M. L. Gilliam and Stephen S. Miller, 1984-85 National Faculty Salary Survey by Discipline and Rank in State Colleges and Universities, College and University Personnel Association, Washington, D. C., March 1985.

8. NIE, p. 10.

9. Carol Frances, "Why Tuition Keeps Going Up," AGB Reports, March/April 1985, pp. 24-31.

10. W. Bruce Bassett, "Cost Control in Higher Education," The Crisis in Higher Education, Proceedings of the Academy of Political Science, ed. Joseph Froomkin, New York, 1983, pp. 135-40.

11. Baldridge, op. cit., p. 25.

12. Mortimer, op. cit.

13. NIE, p. 11.

14. Baldridge, op. cit., p. 41.

15. Howe, op. cit.

16. William F. Proksay, "The Dilemma Colleges Face on Pay Scales," The Chronicle of Higher Education, October 10, 1984, p. 80.

17. Integrity in the College Curriculum: A Report to the Academic Community, (Washington, D. C.: Association of American Colleges, 1985), p. 11.

18. Baldridge, op. cit., p. 2.

19. Baldridge, op. cit., p. 19.

20. George Keller, Academic Strategy, Baltimore, The Johns Hopkins University Press, 1983, p. 39.

21. American Association of State Colleges and Universities, Governance of State Colleges and Universities: Achieving Institutional Mission, Washington, D. C., 1985.

22. Kerr, op. cit., p. 36.

23. Baldridge, op. cit., p. 11.

24. Keller, op. cit., p. 25.

25. "'To Reclaim a Legacy': Text of Report on Humanities in Education," The Chronicle of Higher Education, November 28, 1984, p. 20.

A FACULTY PERSPECTIVE ON ACHIEVING EXCELLENCE
B. ACADEMIC REFORM AND THE DECADE PAST

Irwin Polishook
President, PSC/AFT/AAUP

THE "CURRENT" DEMAND FOR REFORM

One of the few things those of us inside higher education should know that those outside may not be fully aware of is that the demand for academic excellence did not begin three years ago. A cursory review of the literature or the journalism of education going back ten or twenty years or more will reveal some remarkable correspondences to the commission reports that have been issued since 1983—to their concerns, their spirit, and even their specific recommendations. This coincidence does not discredit the current demand for reform. On the contrary, it gives us a valuable opportunity to learn from recent history.

We in teacher unionism are especially appreciative of many of the changes that are now being widely espoused because they are carbon copies of policies we have been advocating for a very long time. To cite a single example: Take a look at the policy statements issued over the years by the American Federation of Teachers—at the position papers and the convention resolutions, the statements and columns of President Albert Shanker, the writing and the speeches of AFT spokesmen and, indeed, the collective bargaining demands of AFT locals, and you will see startling counterparts of today's "new ideas". The newest advocates of academic reform are part of a movement with origins in the past decade.

In fact, one of the first lessons to be learned from a study of the history of educational change is that the source of an idea greatly influences its fate. This applies to questionable ideas, like merit pay, which kicked around for many years until it was picked up, like a cudgel, by President Reagan and thereafter gained much currency. It applies also to indisputably good ideas, like the desirability of partnerships between the colleges and schools in solving common problems. The City University, for one, had more than a hundred such programs in place by 1983, when the subject was given priority by Dr. Ernest Boyer and some elite university presidents. Without appreciating the degree to which such articulation programs were in operation here and elsewhere, they chastised higher education for its failure to adopt them. Nevertheless, this common endorsement gave the idea a new popularity. It is as if nothing exists until a big name recognizes it and attaches to it some measure of celebrity status.

FINANCING THE SYSTEM

A second understanding that emerges from the flurry of ideas, good and bad, past and present, is that they often seem to be substitutes for, or circuitous evasions of the need to finance education. Merit pay again comes to mind, where it is put forth as an alternative to increasing the salaries of all teachers to levels that are generally considered necessary. Another instance occurred recently in New York State, when a commission appointed by Clifton Wharton, Chancellor of the State University of New York (SUNY), made recommendations that received a great deal of publicity. The Commission concluded that SUNY had not achieved the academic status that it deemed worthy of the State, and it made two significant recommendations: that the University be given greater flexibility in governing its academic operations, and that the University be accorded more substantial financial support. In the press reports on the Commission's findings, the flexibility issue got all the coverage. And so too in the testimony of close to 50 individuals and organizations on the Commission report in joint hearings held by the State Senate and Assembly Higher Education Committees, I was among the lonely voices in those proceedings to suggest that no amount of institutional flexibility and no changes in the governance dynamics between university and state will accomplish a great deal if they are unaccompanied by a degree of financing that can compete with that of comparable institutions. Mr. Shanker said a while back that the one experiment that has never been tried in education is adequate funding. The amount of initiative that has been generated by the current interest in reform, while considerable and mostly welcome, still seems to indicate that this lesson has not been learned. The low priority assigned by the city government to raising the average salaries and the starting salaries of New York City teachers today—in the face of grave shortages and questions of teaching quality--suffices to document that point.

"FAD AND SUBSTANCE"

This phenomenon may help to explain a third characteristic of educational reform movements, and that is their commingling of fad with substance. Beware of a new idea that costs nothing, because that may very well be its inspiraton—and its total value. By fad, I do not refer to legitimate innovations that have been proposed, no matter how arguable, nor to such genuine controversies as between the "great books" approach and the "modes of inquiry" approach to the core curriculum. I do refer to such fashions as "relevance" as a basis for curricular design. Consider the following representative selection from the prior era (circa 1970), especially its advocacy of relevance, the supremacy of the students' educational vision, and its condemnation of professors and educators more generally for their intransigence to change:

> There is a deep irony in the fact that the reform movement has its main thrust in the agitation and criticism of students, and that they have been met with a mixture of sympathy, amused tolerance, scepticism, aloofness, opposition, and repression. Faculty members and educators should be at least as interested in education and social change as students, their parents, politicians, and government officials. It is odd, in the face of it, that it seems not to have occurred to educators that one obvious way to cure student unrest is to deal directly with the social and educational problems which are

causing the unrest. The students are the ones who are restless, and one of the basic reasons for their restlessness, among all the others, is the lack of social content, relevance, and sense of purpose in the education they are given.

If educators do not wish to be serious about making the university into a place where students can live a rich, rewarding, and lively intellectual life—an engaged life that commits them to the cause of mankind—they should move over and give the students a chance to invent their own university....

Looked at from this point of view, the schools and colleges can be seen as institutions organized against the interests of those who attend—if by interests are meant the natural things that the young wish to do, the things which can command their involvement simply because they enjoy them and believe in doing them. Beneath the surface of the acts of rebel students against their schools and colleges lies a feeling of resistance to anything official, to the idea that there is an official knowledge possessed by experts, that there is a standard culture. The student reformers say they want an education related to their lives....(Harold Taylor, How to Change Colleges (N.Y., 1971, ix-xx, 35-6).

To be sure, the inordinate weight attached to "relevance" in structuring collegiate programs, like the overemphasis of vocationalism, is not a recent discovery. It was opposed as such—as a fad—by much of the professoriate in the past. Yet it entrenched itself like a golden calf in colleges and universities throughout the country, and now that it has been discredited, these institutions are digging themselves out from under its collapse. Much of the curricular "reform" now in progress is an effort to return to the foundations that were in place twenty years ago.

The process by which that fad and others have insinuated themselves into the academy deserves our scrutiny, because it illuminates the role of faculty in the search for excellence in higher education. The role of faculty in the collegiate enterprise has changed dramatically in the past three decades. The universitas originated as a society or guild of teachers and students and through most of its history the faculty were the sole arbiters of academic decisions and standards, their identity virtually synonymous with the academic entity. That faculty role started to decline with the rapid expansion of higher education in the post-Sputnik era and the concomitant expansion of the size and the authority of academic management. Then we began to hear less about faculty governance and more about faculty participation in governance, more about sharing and proposing, with the disposing in the hands of deans, presidents, and trustees. As students of collective bargaining in higher education know, this decline in faculty governance has been one of the potent forces that generated the growth of academic unionism, and restoring the proper role of faculty has been one of our primary missions. The pressures in the opposite direction continue to be formidable. The increased dependence of higher education on government

support, introducing a new level of power at the very top, the new stringencies imposed on the academy from previously reliable sources of such support, the contraction of student enrollments, the prospects of further shrinkage and the resulting rivalry among institutions have all tended to push the locus of control into the hands of corporate management at the expense of faculty.

AREAS OF CONCERN

My message today is that there is no magic in the achievement of excellence. But excellence in higher education does call for added emphasis in several areas of concern, some familiar, some not:

1. The penchant for fashion is most obvious in the demand for curriculum reform. What should be admitted is that we are now undertaking the reform of a past generation of "reforms". Here the standard of relevance—the connection to currently popular student issues—was too often applied without sufficient regard for academic foundations. As a consequence, in the abandonment of requirements, denial of common fields of study, and acceptance of the insubstantial in the achievement of a degree, the basis of excellence was undermined. Even now, we must be cautious and recognize that every change may not really be synonymous with true reform. As a starting point, the renewal of the curriculum may involve, in large measure, a return to academic practices and traditions that in the past were compatible with excellence.

2. No subject is of greater importance than the elementary and secondary schooling of American college students. No one has to remind professors of the academic limitations of the current generation of undergraduates. Their learning skills, academic discipline, and intellectual discourse all reflect serious impediments to collegiate success. The most comprehensive way to contribute to the reform of our colleges and universities is by aiding in the reform of the schools. Academicians have an obligation to go beyond partnerships with the schools to create models of expectaton and performance that will raise standards before students are enrolled as undergraduates. The academy has a self-interested obligation to recognize that collegiate reform begins in the years of preparation in the American schools. It can influence that preparation through the process of solidifying its own standards.

3. Teacher education and graduate education are primary components of academic reform. This is not to suggest targeting schools of education for more than their appropriate share of responsibility for educational problems. At the cutting edge of contact with schooling, teacher education graduates have shared in the impairments that have overcome education more generally. But teacher education programs have been changing for the better more rapidly than the rest of higher education—whether by strengthening liberal arts requirements for certification, raising standards for admission to degree programs, or testing to ascertain the quality of graduates. The promise of further improvement in education programs, however, will be realized only to the degree that the character of American colleges and universities is itself strengthened—especially in the liberal arts, by demanding higher standards of performance, eschewing programs that are primarily vocational or pre-professional, and formulating new methods of assessment and feedback to insure that educational renewal is compatible with quality.

At the other end of the spectrum, we have to be concerned about graduate education. The perpetuation of the academy depends on its doctoral graduates. More attention must be given to financial support for graduate students and the nature of their training for teaching and research. The retirement of a good part of the current professorial workforce within the decade of the 1990's may create a severe shortage of academic professionals who cannot be readily replaced. Though we must give priority to current problems, their solution cannot result in the future loss of the human capital—graduate students—needed for the continuing vitality of higher education in the United States.

4. Academic management and faculty unions should coalesce in meeting the current challenge. I believe most academic unions recognize that the collective bargaining relationship does not preclude cooperation with management or the support of their institutions during periods of hard times. Is the same tolerance articulated by the nation's academic management of higher education? Here, the rejectionist principles of the Supreme Court's Yeshiva decision and its invocation to fight democratic unions, create self-defeating divisions within the world of higher education. More than one-quarter of the academic and professional staffs have elected to be represented by faculty unions; the non-pedagogical workforce is also being transformed by new organizing efforts that generate needlessly combative postures by the academic management of some distinguished universities. This reality is reinforced by the power of the affiliations these unions have secured in promoting their interests, especially the influence of American Federaton of Teachers (AFT) and the National Education Association (NEA), who between them have more than 2,500,000 members. Common sense should dictate that coalition, not conflict, would best serve the interests of American colleges and universities in the cause of educational reform.

5. The last lesson to be extracted from the past is not to look for scapegoats to bear the singular responsibility for current problems. The favorite target for blame has been the faculty. A recent illustration is a reformist essay in The New Republic (May 6, 1985, p. 30), in which the authors wrote of the movement to re-establish a core curriculum in place of existing systems of unlimited choice and problems arising out of diminished expectations of excellence. "Professors, who have long been the major obstacle to a serious core curriculum, are newly vulnerable," this piece observed, "especially to the prevailing demands that they pay more attention to students and less to selfish research and departmental politics." This style of trendy scapegoating is little different from the flavor of "professor-bashing" in the previous generation of educational change. Then similar charges were directed at the faculty, their collegial and academic governance entities and, more particularly, at their resistance to the surge of "relevance". These contemporary blasts, with their resonance of the past, should remind us of the danger invited by each incremental destruction of faculty authority.

CONCLUSION

The authentic university can be no stronger than the quality of its faculty and non-classroom professional staff. This is why academic unions were created initially and why they continue to receive membership support, whether through individual participation or leadership direction. Authenticity also explains why higher education unions — whether faculty organizations or academic staff entities — have been able to embrace the recent progress toward educational reform. Collective bargaining for professors started primarily as a defense of their personal and professional interests during the tumultuous period of the late 1960's and early 1970's. The definition of those interests has broadened significantly since then. Now, academic unions and their powerful

affiliates can be vital partners in the renewal of American education. But the challenges we face will not be surmounted without an understanding of the past and a commitment by all segments of the higher education community to a unified struggle for lasting reform.

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UNIONIZATION AND ACADEMIC EXCELLENCE: A CHANCELLOR'S PERSPECTIVE

William R. Monat
Chancellor
Illinois Board of Regents

INTRODUCTION

The program for this morning's Plenary Session promises that I will discuss the "Excellence Equation" within the context of a state university system currently undergoing collective bargaining unit determination hearings. I hope you appreciate the delicacy that that topic poses within that context. I will attempt to negotiate my way through this difficult terrain in the following manner. First, I will describe the collective bargaining environment in Illinois and specifically for the Regency Universities System. Second, I will suggest what I hope will be accepted characteristics of quality in higher education. Third, I will identify what, in my judgment, are the pitfalls and opportunities to retain and enhance quality in higher education within a collective bargaining environment. Finally, I will assess the probabilities for achieving that, given circumstances within the Regency Universities System specifically and the higher education collective bargaining experience generally.

THE COLLECTIVE BARGAINING ENVIRONMENT

A. The Illinois Board of Regents System

The Regency Universities System was established in July of 1967 with the enactment by the Illinois General Assembly of the Regency Universities Act. That Act imposed upon the Board of Regents which it created, the sole responsibility for the management, operation, control and maintenance of Illinois State University and Northern Illinois University. In 1969, the Act was amended to include the newly established Sangamon State University. The Illinois Board of Regents was authorized to be the governing agency for these three universities in every respect. The combined enrollment at these three universities of some 47,000 students makes the system the second largest among the four university systems in Illinois, second only to the University of Illinois System with its two campuses in Urbana and Chicago.

B. Illinois Educational Labor Relations Act

Faculty unions have been sporadically active on all three campuses during the past decade. The AAUP, the Illinois Education Association and the University Professionals of Illinois, an affiliate of the Illinois Federation of Teachers and the American Federation of Teachers, have had a presence on all three campuses, but intense organizing activity did not commence until about three years ago. The more aggressive organizing activity was occasioned by the growing likelihood of legislative enactment of enabling legislation authorizing collective bargaining for Illinois public employees. Although sporadic attempts were made over the past decade to enact such legislation, it was not until 1983 that those efforts bore fruit. In that year, the General Assembly and Governor Thompson jointly approved Public Act 83-1014 which established the right of educational employees to organize and bargain collectively and created the Illinois Educational Relations Board to administer the new legislation.

Several labor relations experts have described this legislation as the most "liberal" among the states with such enabling legislation. There is one significant difference between Illinois and most other states, however, and that was the simultaneous enactment by the General Assembly and the Governor of enabling legislation authorizing collective bargaining for all public employees other than educational employees. The Illinois situation can be stated very simply: The Illinois Educational Labor Relations Act authorizes collective bargaining between educational employers such as local school districts, state universities, community colleges and other public educational agencies, and educational employee organizations on the one hand; and collective bargaining covering all other state and local government employers and all state and local government employees on the other hand. Two separate labor relations boards were authorized, one to administer the Public Employees Relations Act and the other to administer the Educational Employees Relations Act.

The provisions of the Illinois Educational Labor Relations Act do not significantly differ from comparable or similar legislation in other states. The legislation makes it lawful for educational employees to "organize, form, join, or assist in employee organizations or engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or bargain collectively through representatives of their own free choice". Employer rights are also identified in most general terms including the provision that employers "shall not be required to bagain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees". Employers are required, however, "to bargain collectively with regard to policy matters directly effecting wages, hours and terms and condition of employment as well as the impact thereon".

C. Unit Determination Questions

Shortly after the effective date of the legislation on January 1, 1984, the University Professionals of Illinois (UPI/IFT-AFT) petitioned the Illinois Labor Relations Board for a broad unit of academic professionals. The UPI proposed a bargaining unit containing ranked faculty and persons identified as being academic professionals without rank. The UPI petition also sought a single bargaining unit for employees at all three universities. Shortly after the UPI petition was filed, the American Association of University Professors filed three separate petitions for individual campus-based bargaining units of ranked faculty

only at each of the three universities. The Northern Illinois University Chapter of AAUP filed in March of 1984 and the Illinois State University and Sangamon State University Chapters of AAUP filed in July. The Labor Relations Board determined that both the UPI and the AAUP petitions met the procedural requirements for filing under the Act. In August 1984, the United Faculty Association (IEA-NEA) filed a petition to intervene upon the AAUP petition for Northern Illinois University and Illinois State University. The Act permits a union to be on an election ballot by intervening upon a representation petition already filed.

Confronted with three petitions from potentially contending employee unions and a Board of Regents not willing to grant voluntary recognition to any of them, the Illinois Labor Relations Board scheduled formal unit determination hearings beginning September 24, 1984. During the course of the ten weeks of hearings, over 200 documentary exhibits were presented and over 4,000 pages of testimony were transcribed. As Chancellor, I testified on two separate occasions and participated in a number of strategy sessions during the ten-week period.

D. Unit Determination Stipulations

During the course of the ten weeks of hearings, the four parties reached stipulation agreements in a number of areas. They indicated that employees included in any bargaining unit would be educational employees defined in Section II (b) of the Act "as any individual, excluding supervisors, managerial, confidential, short-term employees, (and) students". The stipulation also provided that employees to be covered would be professional employees "whose major function is providing educational services". Although the Act provided greater specificity in defining "professional employees", the parties quickly agreed who among the nearly 8,000 individuals employed by the Regency Universities would be included in that category. For example, the stipulation excluded all civil service employees.

Specifically, the stipulation provided that "full-time professor, associate professor, and assistant professor positions should be included in any bargaining unit", and that "full-time instructor, lecturer, and faculty assistant positions held by employees who hold a terminal degree appropriate to the discipline or who have been continuously employed in the position for more than six consecutive semesters, should be included". In addition, the stipulation provided that instructor, lecturer and faculty assistant positions other than those expressly included by the stipulation would be excluded from the bargaining unit.

The four parties also stipulated that specific academic support positions at each of the three universities would be included in any bargaining unit. This stipulation covered 13 position titles at Illinois State University, 35 position titles at Northern Illinois University and 10 position titles at Sangamon State University. The stipulation excluded 21 academic administrative positions at all three universities ranging from the president of the university down through assistant deans, assistant to the dean, and administrative assistant to the dean. Also excluded were the administrative positions in the chancellor's office. Other exclusions agreed to were positions with managerial status, including 15 managerial titles at Illinois State University, 32 such titles at Northern Illinois University and eight at Sangamon State University. Also excluded from any bargaining unit were positions which the parties agreed should be stipulated out without "agreeing upon a specific basis for exclusion". These included 18 titles at Illinois State University, among them, all coaches, athletic trainers and administrators, 23 titles at Northern Illinois University, including comparable exclusion for all athletic personnel, and five titles at Sangamon State University with the same

provision for athletic administrators and coaches.

Finally, the parties stipulated to exclude from the collective bargaining unit, however defined, the faculty of the Northern Illinois University College of Law and the teaching staff of the Laboratory Schools at Illinois State University.

E. Unit Determination Issues to be Adjudicated

The unit determination hearing not only resulted in the parties stipulating important areas of agreement concerning the composition of the bargaining unit, but also clarified for the Hearing Examiner the issues that she must decide, assuming she accepts the stipulations. The issues of contention which remain for the Hearing Officer are:

1. Is the bargaining unit to be system-wide or a campus-based unit?

2. Will department chairs be included or excluded from the bargaining unit?

3. Will administrative and professional employees not specifically stipulated to be included or excluded from the bargaining unit by all four parties be included or excluded?

Post-hearing briefs were filed by all four parties on February 25, 1985. The Board of Regents supports a system-wide bargaining unit of faculty and certain administrative and professional employees, the exclusion of departmental chairs from the bargaining unit and a bargaining unit for representational election purposes extending beyond tenure track and tenure faculty only. Under the Labor Relations Board rules, the Hearing Officer's recommended decision should be filed prior to June 18. Upon receipt of the Hearing Officer's recommendations, the parties will have seven days to file exceptions to that recommendation with the full Labor Board. At that time, the Labor Board may request or entertain requests for additional briefs and/or oral argument. Upon the Labor Board's rendering a decision, an election will be ordered. Under the law, the election can be no sooner than 30 days after the decision of the Labor Board and may not be held if a substantial portion of those eligible to vote are not scheduled to work. It is always possible that should the Labor Board decision adversely affect the vital interests of the various parties, appeals can be taken to the Appellate Court for review. Judicial review of this kind would most likely include a stay of any election order.

EXCELLENCE IN HIGHER EDUCATION

I have deliberately recited, in some detail, the chronology of events leading to the conclusion of the unit determination hearings. I think the positions of parties during these hearings is an important backdrop to any discussion of the maintenance and enhancement of quality and excellence in higher education within a collective bargaining environment and it is to that issue that I now turn.

As I was introduced, you may have noted that I served for five years as Academic Vice President and Dean of Faculties at the Bernard M. Baruch College of The City University of New York, a collective bargaining university. I also served, for a brief time, as Academic Vice President and Provost at Northern Illinois University and for nearly seven years as President of that institution before assuming the newly created position of Chancellor of the Regency Universities System on September

1, 1984. I have served on the faculties at four different public universities, have been a department chairman at two. I hope this endows my observations on quality and excellence with some credibility. Again, I remind you of the characteristics of the three universities governed by the Board of Regents, their history and comprehensiveness. Two of the three have long and, I think, impressive histories of quality education at the undergraduate level and all three clearly have graduate and research missions. Although the three universities are hardly clones of one another and in many ways have very distinct missions, similar in many ways to the differences among the institutions comprising The City University of New York, they also have much in common. And what they have in common, among other features, are institutional commitments to quality and excellence. Let me cite what I mean by those characteristics. This will be brief because I am confident that those in this room have no need for an extended discourse on quality and excellence.

A. The Characteristics of Excellence

The characteristics of university quality and excellence must embrace the following:

1. excellence in instruction and those essential ancillary and support functions
2. excellence in scholarship and research
3. excellence in public and community service
4. quality of students including admission standards and graduation requirements
5. quality of the entire campus learning environment, including
   a. honors programs
   b. library resources
   c. computer resources
   d. student services
   e. extra curricular activities
   f. sensitive and responsible academic student advising
   g. a responsible, respected and viable student government
6. competitive and equitable salaries for faculty and professional staff
7. research support for faculty
8. faculty development support
9. graduate assistant support
10. special research laboratories and other research facilities

This does not constitute by any means an exhaustive inventory of the identifiable components of academic quality and excellence, but few would quarrel with the inclusion of these elements.

B. The Achievement of Excellence

Perhaps it might be equally useful to suggest a more general attempt at identifying the conditions necessary for academic quality and excellence. Any university or college aspiring to quality must be

attentive to the essential need for an actively qualified and motivated faculty, for competent and responsive academic professional support personnel, for library and computer facilities at least sufficient to satisfy realistically the expectations and requirements dictated by the mission of the institution, instructional and research facilities also sufficient to satisfy the same expectations and requirements, a student body motivated and qualified to meet the expectations and requirements of the mission, and an overall campus environment which is supportive of the learning process.

I would suggest some other conditions which are perhaps not quite as apparent. These observations probably reflect the administrative roles I have played over the past 20 years but as a colleague of mine once observed, "Where you stand always depends upon where you sit." I refer to what the Educational Labor Relations Act refers to as "matters of inherent managerial policy, which will include such areas of discretion of policy as the functions of the employee, standards of service, its overall budget, the organizational structure, and selection of new employees and direction of employees". In short, I am reflecting upon the role of academic administrative leadership beginning at the departmental level and permeating the university through the college level, the academic affairs level and ultimately the responsibilities of the president for the performance and quality of the institution.

Academic quality rests directly upon the performance of the faculty. A quality faculty, in turn, is most often selected by and facilitated through the structure of academic administrative leadership. That leadership must have the discretion and the authority to make those decisions, hopefully through a collegial environment, necessary to encourage and sustain excellence and quality. That discretion and authority must be acknowledged by the collegial and governance processes of the institution. Administrators and faculty have indispensable roles in institutional governance but they are not necessarily identical. They intersect at critical points and if a relationship of mutual respect and confidence can be created and sustained, those roles will be directed towards the same institutional goals. It is to that dimension of the collective bargaining environment to which I now turn.

EXCELLENCE WITHIN A COLLECTIVE BARGAINING ENVIRONMENT

There will be a representational election within the Regency Universities System some time before the end of this calendar year. The unknowns with respect to that election are the unresolved issues emerging from the unit determination hearings. Will the election be system-wide or campus-based, will departmental chairs be included or excluded, will other professionals not yet stipulated as excluded or included within the unit be excluded or included, and what will be the role of temporary faculty? The outcome of these unresolved issues will have a direct bearing on the capacity of the system and the institutions to sustain and enhance academic quality and excellence in the event an election results in the designation of a bargaining agent. Even if the outcome of an election is a no-agent option, there is no question that the environment for higher education in the State of Illinois has been inexorably altered as a consequence of the enactment of the Illinois Educational Labor Relations Act.

The Regency University System has been targeted by the faculty unions as the initial organizing target under the new labor relations law. The Board of Governors System, comprised of five state universities, all of which are primarily undergraduate institutions with limited graduate level responsibilities, has been organized by the UPI for a number of

years. But collective bargaining in that system was a result of a voluntary recognition by the Board of Governors and occurred well before the enactment of the 1983 legislation. Both the University of Illinois System and the Southern Illinois University System are attentively following the events within the Regency University System and there is some indication that at least one of the systems will submit an amicus curiae brief before the Illinois Educational Labor Relations Board.

A. The Role of Department Chairs

The position of the Board of Regents is very clear with respect to the role of departmental chairs. The individuals holding those responsibilities are viewed as possessing an essential responsibility for the maintenance of academic quality and the pursuit of academic excellence at the departmental level. Using the industrial model, they are first level management and in a university collegial sense they perform the managerial role closest to the maintenance of quality instruction, scholarship and public service. It is for this reason primarily that the Board of Regents has insisted they be excluded from the bargaining unit. For somewhat similar reasons, the Regents have also insisted that clearly temporary faculty be excluded from the bargaining unit because those individuals are transients and, without reflecting at all upon their competence or potential, do not carry the long-term commitment to the maintenance of institutional quality and the pursuit of excellence that is borne by members of the permanent academic staff. For somewhat similar reasons, the Regents also feel that academic support professionals whose contribution to the academic enterprise is central and indispensable should also fall under the same set of expectations and the same performance evaluation criteria as do regular faculty.

B. System-Wide Units

The Board's position with respect to a system-wide representational election and possibly a system-wide bargaining unit also rests upon concern for academic quality and excellence. The 1967 Regency Universities Act confers upon the Board of Regents responsibility for the management and performance of the three universities within the system. The Board, over the years, has taken very seriously that governance role, and among other policies it has pursued, it has required that faculty and academic staff salaries be determined on the basis of merit, that academic program review and approval be a central responsibility of the Chancellor's office and the three universities, and that overall criteria for appointment, the granting of tenure and promotion of faculty be established by the Board. The Board has understandably delegated many of the detailed processes and procedures to implement these policies to internal university processes. But the Board has consistently exercised with diligence its statutory responsibility for the maintenance of quality and excellence. In order to provide a consistent environment within the Regency University System the Board has concluded that the best means of doing so would be through a system-wide approach. While the Board will continue to insist that the universities, with their somewhat distinct missions, be able to establish campus policies and procedures to implement Board policies, it also will be equally insistent that those Board policies be observed as the governing expectations and measures of performance.

There is some concern that collective bargaining may erode or be detrimental to academic quality and excellence. If the outcome of the process now underway results in a collective bargaining agreement erecting impediments to and constraints of the pursuit of quality and excellence then those fears may well be justified. By this, I mean that

an agreement could make more difficult the pursuit of excellence and the maintenance of quality if it created an environment corrosive of collegiality, made impotent the essential quality control responsibilities of academic administrative leadership, substituted across-the-board for merit salary determinations and, in general, discouraged student sensitivity, scholarship, research and individual initiatives within the faculty.

C. Shared Governance

What exists within the three universities is certainly not perfection. But there is a sense of shared governance and collegiality, there is a broad recognition of faculty prerogatives in curricular and program development, there is an incentive for research and scholarship, and there remains a preeminent role for peer faculty review within the personnel process. But it must also be acknowledged that there is a recognized role for academic administrative leadership in these same areas. Indeed, what I am referring to is generally called "shared governance". I have been part of four different universities over the past 31 years and although some of my faculty colleagues may dispute this observation, I have found a greater degree of shared governance and a broader and more meaningful exercise of collegial processes in the Regency universities than in the others with which I am familiar. Shared governance and collegiality are concepts which are strongly embraced but which tend to be very fragile in their implementation. I am not suggesting that collective bargaining destroys those processes because I have been part of a collective bargaining institution where that did not occur. What I am saying is it becomes more difficult to nurture and enlarge on those values within a collective bargaining environment.

Institutional quality also rests upon the ability of a university to reach outside its own institutional boundaries. In the broad array of external constituencies such as alumni groups, contributors, state legislatures, corporate and other private sector support groups affiliation can be adversely affected by collective bargaining activities. At best, these relationships can be characterized as managing ambiguity and paradox. Either the spectre of collective bargaining issues "spilling over" to these groups for the solicitation of support of a particular position or in those instances where issues external to the normal course of collective bargaining are infused into that process inappropriately, will cause these delicate relationships to become damaged. Great care must be exercised in a collective bargaining environment to ensure that bargaining issues remain appropriately housed within that context. Certainly any sound public university receives significant support for its academic instructional, research and public service mission beyond the immediate process of direct state appropriations. It is important that these fragile university relationships with external constituencies for both programmatic and funding support not be disturbed.

D. Common Concerns

I would concede that there are instances where a collective bargaining agent can be useful in providing supplemental support in the legislative appropriations process. The CUNY experience demonstrates that. Even in this arena, however, it is important that this type of support not supplant or subsume the judgments of the universities and the governing board in the determination of budgetary and legislative priorities. There is a fundamental distinction between representational responsibilities which any collective bargaining agent appropriately has to its members and the public accountability responsibilities which boards of trustees, chancellor's offices and institutions have within the context of "the public trust". While collective bargaining agents and boards of

trustees, systems and institutions can agree upon common themes, both groups can ill afford to assume the responsibilities and, hence, the prerogatives of the other. To be sure, there is a common interest on a number of issues but it is the latter group which has ultimate accountability for the full array of responsibilities attendant to the operations and the flourishing of the academy.

Along somewhat similar lines, relationships between collective bargaining agents and the board of trustees in the various management levels of a system can be, but not necessarily need be, adversely affected in a collective bargaining environment. If one can avoid a pervasive adversarial relationship, styles of administrative decision making and modes of administrative management need not be fundamentally altered. Similarly, collegiality within a collective bargaining environment can also serve to protect delicate system relationships with the Board and, hence, the level of Board support in the pursuit of excellence and its willingness to address new challenges and assume risk postures with respect to emerging targets of opportunity. In such an environment, it is incumbent upon each of the parties to have a fundamental understanding of the discreet and, necessarily, delineated roles of each of the actors in the overall environment.

E. Costs of Collective Bargaining

Collective bargaining is not cost free. It does not save money. Indeed, the opposite is true and fiscal and staffing requirements will necessarily increase. At a campus level, the direct impact will be felt by the budgets and staffs of legal services, the personnel office or offices, university-wide administrative functions such as the computer center, institutional research, budget and planning offices and other ancillary staff and support offices which provide either advice or information sensitive to collective bargaining. Beyond these costs are indirect costs and staff support which, when combined, can become significant. Here, I refer to the time and effort that must be devoted at the academic department level by chairs and their immediate staffs as well as by deans' offices, provost's offices and the president's office. While there is no precise way to measure these requirements, it is abundantly clear that failure at any of these levels to provide sufficient attention to collective bargaining will have potentially disastrous consequences for the entire institution.

At a system's level, there are similar requirements for additional staff capability and expertise in the areas of labor relations, legal services, personnel, computer and information systems, fiscal affairs, as well as indirect time of the chancellor and vice chancellors. Lastly, there is a strong potential of major impacts upon the board of trustees both in terms of committee structures or the absence thereof, as well as the way in which the Board or designated members of the Board become involved with the collective bargaining process from a detailed policy viewpoint. This does not suggest that the Board would, or for that matter, should become involved directly in the collective bargaining process but, surely the Board has the ultimate public responsibility for the establishment of the various policy parameters within which matters of collective bargaining operate.

CONCLUSIONS

By way of conclusion, there are several general observations which I would like to make. There should be no illusions on anybody's part that collective bargaining is a very expensive, time consuming process that can negatively affect the qualitative aspects of the academy if

relationships are not conducted in the most professional, collegial and academically sensitive manner possible. In the final analysis, it is not the presence of a collective bargaining environment in and of itself which affects institutional quality. Rather, the quality of the academy depends upon the commitment of the players involved in a collective bargaining environment to the fundamental purposes of the university — excellence in teaching, scholarship and public service.

It is the leadership qualities of a system executive and of campus presidents and other campus administrators, as well as the leaders and key representatives of collective bargaining agents that will determine, in virtually every instance, the tone and the manner of caring for those components of quality recited earlier. Collective bargaining cannot supplant the elaborate system of shared governance with all its attendant fragilities; at best, it is an augmentation of those processes and must be, therefore, conducted in a manner that is least disruptive to internal governance prerogatives and balances. There are those instances where a collective bargaining agent is present that new and creative partnerships must be forged. Collective bargainng in and of itself is neither an evil nor a panacea. It is simply a potential new reality within the State of Illinois and elsewhere which must be addressed in a forthright, honest and open manner. If this is a vision shared by all the parties involved, the ensuing relationships can evolve in a way that are mutually supportive and beneficial. But it just does not happen naturally. It requires a commitment from all actors. As a wise sage observed, no one promised it will be easy.

EXCELLENCE: THE LEADERSHIP FACTOR

E. Gordon Gee
President
West Virginia University

INTRODUCTION

If I were to describe the modern university presidency in some graphic fashion, I would share with you a story which I recently heard about a man who was driving down a dirt road and found himself behind a very large truck and was unable to get around the truck, which, of course, was most distressing. Moreover, the truck would stop about every mile, the driver would get out of the truck, go back and beat on the side of the van, get back in, drive another mile, and repeat the process. After the third of these incidents, the man in the car could stand it no longer, so at the next stop, he got out and asked the truck driver, "what in the world are you doing? I have been observing your conduct, and I just want to know why you are beating on the truck?" The truck driver said, "It is very easy—this is a two-ton truck, there are four tons of canaries in there, and if I don't keep a lot of birds flying, I am not going to get where I am going."

Those of us in leadership roles in higher education these days are familiar with the challenge of keeping a lot of birds in the air if our institutions are going to reach their potential. This, of course, assumes that our colleges and universities know their destinations and can define their own destinies. I believe it is precisely at this crossroad that higher education finds itself at this time. Simply put, we must now make difficult choices if we are to maintain and enhance the intellectual and educational excellence in our faculty and students, which is the core of the academic enterprise.

THE LEADERSHIP FACTOR

My theme today is "excellence—the leadership factor." I want to suggest to you four ways in which leadership relates to the idea of excellence in higher education.

1. First, it is the role of the leader to understand excellence and to share that understanding with others.

2. Second, leaders must choose excellence over its alternatives, bearing in mind that the good is often the enemy of the best.

3. Third, leadership demands the careful analysis of the issues and forces that affect higher education from the environment, as well as internally.

4. Finally, leaders must be strategic managers, able not only to see a vision of excellence, but to make it happen.

The issue for higher education in the 1980's has become that of quality—buzz word though this term has become to some of our colleagues—quality of teaching, research, and civic enterprise of value. I realize how unrealistic at first hearing it may sound to some for us to be talking about quality and excellence when at this minute we are confronting several difficult and critical issues and problems that threaten our ability to achieve our missions. However, as painful for all of us as the solutions may be, we must not be myopic and allow the immediate to snuff out the future. And, it is precisely because of the immediate economic, demographic, and social dilemmas we face that we must now recognize that our institutions cannot do everything—teach all of the subjects, provide all of the amenities, and play all of the sports in the same way. Those that we believe are central to the sense of our individual and collective educational missions, we must choose to affirm. Others we must choose not to sustain.

You know, as I do, that excellence is a popular word these days. Our fascination with the idea of excellence is demonstrated by one of the fastest selling phenomenons in the history of publishing—Peters' and Waterman's In Search of Excellence, which sets forth "lessons from America's best-run companies."

In fact, as members of the academic community have already observed, the lessons Peters and Waterman have learned from the corporate world have striking similarities to principles that have enabled universities to thrive since the 1500s. At universities, innovation is part of the nature of things. We have long enjoyed the participatory structure toward which corporate management is now turning. But corporations are relatively simple when compared with universities. Their measure of excellence is whether they are growing and making a profit.

The "bottom line" for higher education is more complex than that. At West Virginia University, for example, our unique mission combines teaching, research, and public service with the general demands of our role as the State's land-grant institution. Achieving excellence across these broad dimensions is and will remain a challenge that does not lend itself to easy solution. Achieving excellence requires an institutional willingness to change.

As you and I recognize, universities are among the slowest changing institutions in society. While they serve as agents of intellectual change, they resist reshaping their own institutional boundaries. In short, they find it difficult to make choices. To outsiders, such resistance seems curious—even ridiculous—in those whose lives are spent pushing back the boundaries of ignorance, honing fresh minds, and demanding skepticism in accepting any prescribed truths. Nevertheless, until quite recently, the shape of universities has seemed inviolate. Recent events and realities are, however, beginning to force change.

Charles Darwin, the great naturalist, died in 1882 at the age of 73. He was buried in Westminster Abbey. Yet, even in death, some doubts lingered as to his efforts. "Do you believe that Darwin was right?" a worried peer is reported to have asked T. H. Huxley, one of the pallbearers. "Of course he was right," snapped Huxley. The peer replied,

"Couldn't he have kept it to himself?"

ISSUES CONFRONTING UNIVERSITIES

In the business of academic administration, it is natural to want to hold back bad news. Unfortunately, the issues confronting universities cannot be ignored. You can read the tally sheets as well as I. Rhetoric to the contrary would only be, to quote George Bush, "voodoo-economics". It seems clear that over the next five to ten years, factors external to all American universities will seriously threaten our futures. As we sail our ships into the high seas, the warning flags signaling a stormy future have been hoisted. Let me indicate a few.

1. Inflation and recession, the twin enigmas of our current economy, threaten the financial foundations of American universities.

2. Dramatic demographic shifts are occurring, affecting enrollment patterns, needs to be served, and clientele to be attended to.

3. Patterns of financial support for higher education are shifting quickly and dramatically, fostering chaos and uncertainty.

4. Major changes are taking place in public policy concerning education and research, affecting not only levels of support, but the nature of academically oriented activities as well.

5. Societal expectations and demands on higher education are altering their mix, calling for imaginative anticipation by universities in serving the future. While these changes affect the future, they demand our attention now.

My somewhat cloudy crystal ball tells me that financial support patterns in the years ahead will extend the trends of the recent past, which have shown on a national scale that higher education has not done well in preserving its share of public and private dollars.

STRATEGIC PLANNING

It appears to me, therefore, that the key to our success as administrators and faculty members, is going to be how to cut back and to move forward at the same time. Our challenge is to manage for excellence—not for decline. I believe that if you plan, manage, and budget for decline, that is precisely what you will reap. The best method to overcome such a downward spiral is what has become known as "strategic planning", or the rational selection of courses of action that are most likely to bring success for the future, based on a scrutiny of the changing environment, its restraints, with an assessment of new opportunities. We must constantly identify new initiatives while we consolidate and reassess the old.

The general conditions that confront us could place all educational institutions, including my own, increasingly on the defensive. A defensive posture worries me most, for therein lies the seeds of institutional paralysis. Indeed, it would be very easy for us, as a jackass in a snowstorm, to hunker down or withdraw, and as such gracefully manage ourselves into decline. Such reactions are unacceptable for our present, and for our future. Instead, we must re-engage ourselves in efforts of revitalization.

A time of economic contraction and acute uncertainty brings with it a tendency to be overwhelmed by the perceived problems of the immediate present and to read the future too narrowly in its terms. That makes it more difficult—but even more important—to restate and renew the case for higher education; still more important to act and speak as institutions whose visions must look always to the longer term and its larger consequences.

It may seem harder also for all universities, vulnerable to the continuing effects of economic constraint and the distresses of lowered confidence in higher education and its prospects, to maintain and realize that view. But this, too, makes it even more important that we do so and that we take leadership in that cause.

We need to now get on with debating and undertaking those measures that will extend our own ability to give effective voice and shape to higher learning. As an enterprise that prides itself on the quality of its faculty and its students, on the freedom and breadth of its intellectual environment, and on a profound common sense of serious purpose, we have every reason and opportunity to do just that.

Excellence, then, will only be attained at the institution I lead or in higher education in general if we collectively set about to chart our own future. And, as has become all too apparent to many of us, this means that each of us will have to engage in hard choices.

As I consider the realities of making such choices, I am reminded of a quote from the book Tom Sawyer Abroad where Tom Sawyer says:

> There's plenty of boys that will come hankering and gruvelling around when you've got an apple, and beg the core off you; but when they've got one, and you beg for the core and remind them how you give them a core one time, they make a mouth at you and say thank you most to death, but there ain't-a-going to be no core.

I am afraid that all too many of us want to share others' cores but not our own. I am concerned that all too many of us want to assume that everything that we have done in the past in our disciplines or our institutions is absolutely necessary, and are therefore reluctant to investigate what might not be necessary or to risk the considerable heat from advocacy groups, within and outside the university, representing interests or programs or structures that ought to be eliminated. I believe that we must all be willing to lose ourselves in the sense of the whole if we are to reach our potential.

We must still ask ourselves, however, how do we best go about addressing institutional issues and achieving a new institutional equilibrium of academic strengths in our programs? We at West Virginia University are in the process of setting ourselves on a course to answer those questions. It is not an uncommon strategy. What we must do—what we will do—is to do what West Virginia University does best—by developing the great strengths of our various colleges while launching cooperative institutional efforts that capitalize on those strengths. If all of this sounds easy—it will be far from that. It has required us to reorganize and reshape the systems for management and the educational

policies at West Virginia University. That is my belief and that is the course that I set us upon three and a half years ago.

A LOOK AHEAD

The prime imperatives for the future of higher education, I believe, are that we must develop ways to use our financial and human resources prudently, imaginatively and wisely. At the same time, we must continue to reflect and nourish the pluralism found in our society by continually seeking out, as students, faculty, and staff, men and women of spirit and ability. Of all the immediate challenges facing our universities—the needs to enhance the research capability of our libraries, support academic science, secure the quality of the health sciences, finance graduate students, and embrace part-time or older students in new patterns—none are greater than the need to attract into the academic profession the ablest and most dedicated men and women. Nothing will be possible without an able, new generation of teachers and scholars to help shape our long-term future.

At West Virginia University, we have learned that many of the choices we have made and will make with regard to the University's academic programs are not just "yes or no" decisions. We are not engaged in a "thumbs up" or "thumbs down" exercise that simply separates the good from the bad, keeping the one and discarding the other. The questions we must ask about our academic programs and the options available to us for making ours a better University are not that easy, nor should we expect them to be. We are undergoing evolutionary, not revolutionary, change.

What we have set about doing is to determine those general directions in which this institution should move, given its mission, its capacities, and its opportunities. Only within such parameters regarding the future of the University can specific program decisions be made.

At West Virginia University, I have implemented an administrative structure and style that consciously and collaboratively approach our University in terms that will, in fact, be true to its spirit and mission—a managerial approach which conceives of the University as a whole, and that emphasizes the need for all of the parts of the University—faculty, staff and students—to contribute and collaborate for the purposes of the whole. This administrative structure affirms the need for new patterns of teaching and research and affiliation to emerge between departments, among departments, between our schools and colleges, and among departments and schools and colleges. I believe that such an approach is absolutely necessary if we are, indeed, to set ourselves upon a path which leads us to excellence. Such an administrative organization must allow us flexibility to creatively exercise our will and wit, while allowing us to do better what we believe that we may already do well, without necessarily thinking that the only way of maintaining the educational diversity and excellence necessary for a great university is by spending money.

This is an uncommon challenge, for unless we develop an administrative approach that allows ourselves to manage ourselves, rather than be managed by internal and external forces, then any attempt to engage in academic planning will be at best stopgap, and more likely worthless rhetoric.

At the same time, West Virginia University undertook a strategic planning process in order to identify strengths and weaknesses of the University and to create a workable set of assumptions and goals regarding the short- and long-range future of the institution. When I

assumed office in 1981, we desperately needed to know where we were, where we were going, and to be able to articulate this direction clearly and precisely, to all who would listen.

Through an informal Academic Planning Committee and an external consultants' review—the Benedum Study Project—we have examined and redefined our University goals, objectives, and priorities. We have engaged in a careful review of our curricula and programs to identify new opportunities for beneficial changes, and are now dealing with multiple recommendations regarding restructuring, curtailment and consolidation of some academic programs. We are devising strategies that will enable the University to achieve new economies and greater productivity for the hard times ahead, at the same time helping us reorient and redesign the University to enable it to advance in quality and service. Strategic planning as we have defined it is generally difficult to do within universities, but it became more difficult during a period of contraction because certain functions may have to be eliminated, as I have already indicated. But, the tragedy of academic planning to this point in many institutions is that it has been apocalyptic in nature. The planning that I have directed is that which allows us to think in terms of obtaining a new equilibrium by contraction rather than by growth. Our strategic planning has operated on the one indispensable principle which I believe is essential for university change in the 1980s. That principle is the one to which I have already alluded: to grow in quality in a time of financial constraints, we in higher education need to accept the principle of substitution. That is, to race out into the academic growth field of the 1990's, it is necessary to trim or discard some of the programs of the 1950s. Our institutions can no longer afford, if they ever could, to keep growing like barnacles.

I am led to believe that business firms usually understand this principle, and government agencies are beginning to. The best universities have begun to do so, as Stanford did when it eliminated the School of Architecture to build stronger schools of business and engineering. University life in the 1980s may not be a zero-sum game, but the overwhelming amount of qualitative growth will probably derive from internal realignments. If our universities fail to redesign their interiors, they will lack a defense against less knowledgeable and sometimes dangerous pruners and slashers from the outside.

AN AGENDA FOR EXCELLENCE

Before I move on to some final comments, let me share with you certain caveats that will exist as we attempt to establish an agenda for excellence in our institutions. Among those are:

1. There are no panaceas. "Nothing works well for everything, or very well for very long for anything."

2. All solutions are going to cost something.

3. All major educational concerns can involve multiple values, beliefs, and interests. Many of these are incompatible. Hence, attempted solutions may involve trade-offs.

4. Educational issues are complex and unpredictable.

5. You cannot satisfy all of the people any of the time or any of the people all of the time. Or as Robert F. Kennedy used to say "One-fifth are against everything all the time."

6. The pursuit of self-interests will not solve collective

troubles. It will only lead to the tragedy of the common, the situation where all the farmers of the village exploit the common land so extensively that it no longer provides grazing for anyone's animals.

7. We cannot predict the future, and certainly not all at once. Decisions must be made progressively and their consequences constantly monitored.

I have spent the majority of this discussion focusing on what I believe to be the nature of our members of the higher education community, and the processes through which we must go in order to develop institutions more fully committed to excellence in all their undertakings. No one should leave this room believing that tough decisions are not going to have to be made; academic leaders must take the initiative, with the support and understanding of faculty, students, and staff, in order to implement successfully such decisions. As desirable as it may be to move quickly, much of this process will be slow and deliberate. Therefore, we must begin now. Leo Durocher put it better: "You don't save a pitcher for tomorrow. Tomorrow it may rain."

Lest any of you doubt, after my speech today, let me state unequivocally that I am basically optimistic about the long-term future of higher education. I was quoted in a newspaper article early in my administration as saying that I am not a kamikaze pilot. That is true. I did not assume the presidency of West Virginia University to engage in the management of decline. I assumed my position in order to engage in educational leadership and the development of a stronger university. I believe that everyone in this room shares my intention. Even as personally difficult as it may be, we must commit ourselves to making the hard and necessary decisions, and to living with those decisions with our colleagues. We must press the case for our institutions and for higher education in every forum at every opportunity. We must say in every forum and on every occasion that education is an investment. We must say without apology, we must say to anyone who will listen and to those who will not that you can postpone many government services and catch up, but you cannot postpone higher education and make it up—not without great costs.

In every way possible, on every appropriate occasion, we must try to articulate as effectively as we can that scientists and engineers and experts of all kinds do not emerge by some sort of spontaneous process. That such people are educated in our universities and if they are not, in sufficient numbers and sufficient quality, the nation's hope will not be realized. We must educate those who support our institutions that there is no substitute for trained intelligence and for the prepared mind.

Across the nation, we must share with people that despite the hard times ahead, our colleges and universities are devising bold, strategic plans to enable them, once again, to continue a dash toward full distinction as an academic community. And I hope that in those discussions, we will convince those with whom we speak if they and the colleges and universities can exercise their courage and will, if they can jointly care about their children, their culture, and their extraordinary opportunities, and if they can together act to implement the strategies which will unfold from our collegial efforts, the future of higher education could astonish even the gloom purveyors.

VI. EMPLOYMENT DISCRIMINATION ISSUES

A. THE CORNELL EXPERIENCE
B. THE CUNY EXPERIENCE

EMPLOYMENT DISCRIMINATION ISSUES
A. THE CORNELL EXPERIENCE

Joan Roos Egner
Associate Provost
Cornell University

INTRODUCTION

Cornell University has just emerged from a long and difficult lawsuit which, I believe, is unusual if not unique in having involved many of the national civil rights issues argued over the past decade involving colleges and universities. The lawyers called the case Zahorik et al. v. Cornell University, (No: 83-7450). Everyone else called it the "Cornell 11", although only five plaintiffs were involved.

It is still too early to review the case with the detachment an historian might bring to bear. However, I should like to discuss some of the issues of national import which were raised and decided in this case and which offer lessons that may find uses elsewhere in the academic world. Those issues are: due process of law in the regulatory process, confidentiality, intramural reform, and the role of statistics.

DUE PROCESS OF LAW IN THE REGULATORY PROCESS

The first national issue involves the matter of fairness and impartiality by federal and state agencies in the investigation and determination of such cases. Unlike the court system, a single administrative agency often combines three roles: investigator, prosecutor and judge. This amalgamation of functions poses a fundamental problem. The problem has become critically important with respect to higher education which, because of a long tradition of academic freedom and autonomy, has been largely insulated from detailed regulation by extramural agencies until recent years.

The "Cornell 11" case began sometime in 1978 when the U. S. Department of Labor, Office of Federal Contract Compliance (OFCCP), began an investigation of a decision by a departmental faculty, supported by the dean of the college, not to promote an assistant professor to a tenured position. The University had no immediate notice that a complaint had been filed, and no immediate explanation of the nature of the complaint. At the outset, while agents of the OFCCP conducted an investigation and, apparently, interviewed various persons about the case, the University was not offered an opportunity to respond or to present its own interpretation of events. Indeed, the regional office of the OFCCP appeared to have reached an early decision on the merits of

the case before discussions with the University had begun.

Consequently, the first formal presentation of the matter by OFCCP to the University administration came as something of a shock when demands were made upon the University which assumed that the plaintiff was qualified for tenure at Cornell, that the complainant was the best qualified candidate for the position, that the tenured position should be filled at that time by a person of the complainant's particular skills and that an external agency was entitled to impose that decision upon the University.

These matters, historically, have been regarded as within the sole prerogative of college and university faculties, deans, presidents and trustees. The Supreme Court, in recent decades, has decided a number of cases which accord constitutional recognition to at least some aspects of "academic freedom". Prominent among these constitutionally recognized prerogatives of colleges and universities is the right to decide who shall teach, as well as what shall be taught (Lieberman v. Gant, 630 F.2d 60 (1980)); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

The power of the federal government to reach into the colleges and universities has been magnified by the creation of a complex regulatory procedure affecting every faculty appointment and promotion. This system, of course, is intended to assure compliance with equal opportunity and affirmative action requirements which govern all federal contractors. The power to halt or suspend the award of federal research grants and contracts is the power of life and death to a major research institution. Clearly, the federal government has a proper and necessary role in assuring that public funds do not flow to an institution which sponsors or condones a policy and practice which flouts the law of the land, as expressed in federal statutes and the executive orders of the President. Just as clearly, the right to withhold research grants and contracts is not simply the equivalent of withholding a privilege in which the recipient has no legally protected interest.

A doctrine that permits research grants and contracs to be withheld, without prior notice and an opportunity to be heard by an impartial tribunal, could be used to manipulate colleges and universities at will. The strongest institutions in the country, defined in terms of federal research grants, would become the most vulnerable and the most susceptible to pressure. Eventually, during the OFCCP investigation, the University was permitted to know the particulars of the complaint and to respond. At this point, we encounter the second national issue in the case.

CONFIDENTIALITY

The University, once given notice of the particulars of the complaint, could not respond to the OFCCP without disclosing the votes of each member of the concerned faculty. In order to make a meaningful defense, mere disclosure of the vote would not suffice. A full and detailed explanation in justification of each vote had to be provided as well.

Happily, the University administration was spared a dilemma which might have pitted the legitimate confidentiality expectations of the faculty against the critical need to justify the decision to an external agency which could destroy the University's ability to conduct federally supported research. It takes no imagination whatever to recognize the high stakes this issue has to a University which ranks in the top six in the nation in total research expenditures in the fields of science and engineering.

The senior faculty of the department volunteered to submit to sworn depositions to be conducted by the OFCCP during a proposed campus site visit. The University even agreed that the complainants and complainants' attorneys could attend and witness these depositions. During these discussions with OFCCP, the previously obtained written and sworn statements of each faculty member regarding his or her vote were disclosed to OFCCP on a confidential basis. The text of outside letters of recommendation, with identifying names and circumstances removed, were also shared.

Eventually, the OFCCP decided not to conduct those depositions. Many months later, the OFCCP issued a report which found no evidence of a pattern or practice of discrimination at Cornell.

INTRAMURAL REFORM

This brings us to the third national issue in the case. There is a fundamental problem associated with the secrecy which traditionally surrounds the peer review process. Confidentiality is important to the continued vitality of the peer review system. If senior faculty members cannot rely upon an expectation that their professional opinions of juniors will be protected from casual and routine inspection by external regulators, it may be impossible to rely upon candid evaluations. If we value academic excellence, we cannot allow the appointment and promotion system to become a legal snare and a bureaucratic obstacle course which discourages hard but honest decisions. Clearly, a compromise is needed which will serve the internal needs of the colleges and universities without sacrifice of the civil rights of their junior faculty.

The solution is obvious. The colleges and universities must monitor themselves in a way which inspires confidence that every appointment and promotion is based upon an honest professional estimate of past academic performance and future promise. At Cornell, the faculty have developed a grievance procedure which permits a panel to review any claim that a negative promotion decision was based upon improper or irrelevant professional considerations or that procedural flaws may have affected the outcome. The plan has been approved by the Board of Trustees and has been at work over the past three years with great success. In addition to promotion and tenure decisions, there are grievance procedures to cover the decisions to not reappoint an assistant professor and to not hold a promotion and tenure review.

The University review panels have no authority to substitute their own professional judgment for that of the department directly involved, but the faculty status of the reviewers, and their familiarity with the customary procedures applied in such matters assures a knowing and searching evaluation of the fairness and care which the departments and deans have employed in each case. Just as importantly, the grievance procedure requires a full written exposition of the reasons for the negative decision by the department and/or dean.

No one will ever know whether the Zahorik matter would have become a lawsuit if this grievance procedure had been available in 1978 or 1979. In any event, the statement of reasons required by the procedure would have accorded a qualified privilege of confidentiality to the individual votes of the faculty directly involved.

THE ROLE OF STATISTICS

A. Disparate Treatment

The plaintiffs pursued two concurrent theories: disparate treatment and disparate impact. First, each claimed that her own denial of tenure had been motivated by sex discrimination. This, in legal jargon, is a claim of "disparate treatment". The University contended that each vote had been based upon an honest professional assessment and was not motivated by the gender of the candidate. To succeed with these personal claims, each plaintiff had the burden of proving a discriminatory intent. The plaintiffs, in the opinion of the courts, produced no direct evidence in support of that claim. In an effort to produce indirect or circumstantial evidence, the plaintiffs argued that a somewhat greater percentage of men than women had been granted tenure during a particular period. The Court of Appeals held that, even if accurately compiled, the plaintiffs' small sample and modest statistical disparity was insufficient to permit an inference of discrimination.

Most importantly, for all cases of this kind to be tried in the future, the Court recognized that tenure decisions are not made by a single University authority but are highly decentralized among vastly different departments and academic disciplines. At Cornell, over one hundred departments are organized within ten different colleges. Consequently, the Court continued, gross statistics drawn from across the entire University are meaningless unless broken down by the departments which effectively make such decisions. Statistical evidence that more men than women were promoted in the Physics Department, for example, would lack all circumstantial significance when applied to another department. Even within the framework of the Physics Department, the statistics would be unpersuasive without reference to the actual availability of women in that field at a particular point in time. The same rule would apply with respect to other disciplines in which the availability of women might be at wide variance as with physics.

Finally, the Court held that aggregated statistics, based on University-wide data, would not support an individual claim of disparate treatment without evidence connecting such data to the plaintiffs' own individual candidacy and treatment.

B. Disparate Impact

The Zahorik plaintiffs, in addition to their individual complaints, sought to establish a pattern or practice of discrimination by the University in order to justify expansion of the case into a major class action in which the five individuals would also be permitted to represent hundreds of other persons who, it was claimed, were also discriminated against. In the end, the courts denied the plaintiffs' motion for permission to act as representatives of a class, however, the statistical theories they relied upon deserve our attention.

The plaintiffs, on this branch of the case, argued two additional propositions: First, that women were not represented in the faculty in the numbers which would have been expected if appointments and promotions had been made on nondiscriminatory grounds; second, that this result was caused by a selection criterion which, while facially neutral, was not job related and resulted in a disproportionately negative effect upon the class. This, in legal jargon, is a "disparate impact" claim. The plaintiffs could produce no causal connection but argued that the subjective nature of the selection criterion (i.e., the facially neutral standard of "excellence") amounted to a discriminatory pattern or

practice. Here again, the courts resolved a point which is critical to the continued existence of the peer review system as traditionally understood and practiced in the academic world. The Court held:

> ...Cornell's selection criteria, however difficult to apply and however much disagreement they generate in particular cases, are job related. Accomplishments and skills in scholarship and teaching are obviously relevant to employment in tenured professorships.

Finally, the Courts held that the plaintiffs' statistical evidence regarding the composition of the faculty by sex did not show a disparity between the availability of women for such posts and their presence in the faculty of a kind which would justify an inference of possible discrimination.

During the progress of the case, it had become clear that the courts would not find circumstantial evidence of discrimination from a disparity between the number or percentage of women in the general population and their number or percentage in the faculty. This is a crucial position. Otherwise, any institution granting the Ph.D. degree would find itself under a presumptive obligation to graduate the same percentage of women in every academic discipline. Moreover, that number would have to mirror the percentage of women found in the general population. As recently as 1983, however, women were awarded only 7% of the Ph.D. degrees awarded in Physics, only 17% of those in Chemistry and 4% in Engineering. Since women constitute 51% of the population, every research university would find itself under a duty to explain and justify that disparity to a regulatory agency which, if not satisfied, could terminate all federal funding.

Presumably a sufficient explanation for any disparity between a percentage found in the general population and a percentage found in an academic discipline also could be found in a case-by-case evaluation of the applicants. However, the institutional burden would be enormous, if not wholly unmanageable, given the decentralized decision-making structure, the nonstandardized nature of the data and the inherently subjective nature of the decisions themselves.

As a practical matter, therefore, the determination of the U. S. Court of Appeals in the Zahorik case will permit colleges and universities to defend cases based on statistical claims, on their merits, and to proceed to trial, if necessary, rather than reach settlements which the institutions might view as a compromise or a surrender of basic principles of academic freedom and autonomy.

CONCLUSION

The Zahorik case made at least four notable contributions:

1. It is no longer possible to claim that peer review decisions, based upon subjective estimates of past accomplishment and future promise, are legally suspect merely because such estimates cannot be objectively weighed or measured.

2. The case set in motion internal discussions at Cornell which led to a parting of the curtain of secrecy which, traditionally, had surrounded the peer review process. The grievance system now in place permits the community of scholars to assure itself that its own professional standards of integrity have been met regarding academic appointments and

promotions.

3. The case also reminds us that the laws, including not only the statutes enforced by courts but also the administrative rules enforced by governmental agencies, should be known in advance and applied in a reasonably uniform and predictable way from case to case. Due process of law requires that colleges and universities should be given specific notice of a claimed violation of the rules and an opportunity to be heard by an impartial judge before a decision is reached. The administrative law process must never be exempted from these basic principles.

4. Perhaps most importantly, the case heightened the sensibilities of faculties, deans, presidents and trustees all across the country regarding their equal opportunity and affirmative action obligations. The decision in the Zahorik et al. v. Cornell University case strongly supports the right and duty of the University faculty to make reasoned judgments based upon necessarily difficult, conflicting and largely subjective assessments of past scholarly achievement and future potential. Excellence must continue to remain the criteria for tenure and promotion.

EMPLOYMENT DISCRIMINATION ISSUES
B. THE CUNY EXPERIENCE

George Maginley
University Affirmative Action Officer
City University of New York

Although the program description may lead you to believe that this session will focus on sex discrimination as a problem, discrimination seems to strike in many forms. Just think of the various laws forbidding discrimination of many groups in our society: color, national origin, religion, handicap, veteran status, age and sex. Most people would fit into one category or another, and when nothing fits there is always "reverse".

Happily, I can say that because there are collective bargaining agreements for virtually every staff category in CUNY, I and other campus affirmative action officers do not spend 90% of our time dealing with discrimination complaints or grievances, as some other affirmative action officers must. These collective bargaining agreements all have nondiscrimination sections which cover all of the before mentioned categories. Typically, the grievance process works extremely well, and the University and unions formally engage in addressing grievances of any stripe, including discrimination. This enables the campus affirmative action officers to spend 90% of our time addressing the mechanisms which implement affirmative action and equal employment opportunity.

AFFIRMATIVE ACTION MISCONCEPTIONS

The present administration had mounted an attack on affirmative action which, I believe, had given the public at large a misconception of affirmative action. The following describes some of what is being "communicated" to us:

1. To reach a finding of discrimination intent to discriminate must be proved.

2. There were three attempts to revise the regulations governing the executive order to expunge goals and timetables which were called "quotas".

3. There have been recent rumors to rescind the executive order altogether.

4. The Supreme Court decision regarding Title IX and the Grove City College case had the federal government taking a position against one of the established anti-discrimination laws.

5. The changes in the membership of the United States Commission of Civil Rights which had provoked an anti-civil rights position of the Commission.

6. Comments by Pendleton and Reynolds seem to undermine justice.

7. These same people seem to have a lack of understanding or concern about "comparable worth".

8. The using of the Stotts decision of the Supreme Court by the Administration to force changes of affirmative action programs and consent decrees made by local governmental agencies.

9. The selective quoting from a major study citing successes of Title VII and the Executive Order in order to discredit affirmative action.

This kind of communication is "doublespeak, doublethink," and rewriting of history. These issues are intended to give the general populaton the sense that affirmative action had had its day and that women and minorities no longer need attention.

Very often, groups within the University (students, faculty, other staff, union representatives, women, ethnic groups, etc.) suggest that there would be an oversight of the affirmative action program, because, clearly, those of the "protected class" are in some way being mistreated. I was once asked by a member of the Board of Trustees, "Who looks over your shoulder regarding affirmative action?" My reply was, "Outside of this Board and the appropriate Board Committee, there are the Chancellor, my Vice Chancellor, the City Commission on Human Rights, the Office of Federal Contract Compliance Program of the Department of Labor, the Office for Civil Rights of the Department of Education, Campus Affirmative Action Committees, the State Education Department, the campus newspaper which always misquotes me and misstates that every now and then an arcane state, federal or city agency makes a request for some special, and very important report."

What I am really trying to say is that we are under scrutiny. I suspect that private colleges and universities are almost as closely scrutinized, but I leave that for Provost Egner to say. The City University is in compliance as of the 1980-81 level of when two of our major colleges underwent an on-site compliance review of the OFCCP. The result was a letter of compliance and a standard followed by the other Colleges of the University.

I do not know about other colleges and universities, but I believe they are in compliance with various tolerable and interactable problems. In CUNY, there are still areas of underutilization which are outstanding and of concern, although there had been progress. The following table sets forth the demographics of the CUNY faculty.

TABLE ONE

FULL- TIME FACULTY

Year	Total	Women %	Minorities %
1977	7,221	2,105 (29.1)	1,232 (17.0)
1981	6,799	2,236 (32.9)	1,200 (17.6)
1982	6,829	2,306 (33.8)	1,201 (17.6)
1983	6,819	2,334 (34.2)	1,255 (18.4)

FULL-TIME INSTRUCTIONAL STAFF (INCLUDING FACULTY)

Year	Total	Women %	Minorities %
1977	9,273	2,813 (30.3)	1,703 (18.3)
1981	9,311	3,295 (35.3)	1,876 (20.1)
1982	9,471	3,427 (36.2)	1,923 (20.3)
1983	9,557	3,532 (37.0)	2,034 (21.3)

MELANI

If all of this scrutiny and oversight were in place some eleven years ago, maybe there might not have been a class action suit by female members of the instructional staff. Nevertheless, effective September 10, 1984, the plaintiffs and the City University of New York entered into a consent decree, approved by the court which is called the Melani Consent Decree (MCD).

The Melani Consent Decree, in addition to providing for monetary distribution to class members, established the University Affirmative Action Committee (UAAC) to address the policies and procedures of affirmative action in the University. The Chancellor of the University perceives the scope of this Committee to include, in addition to women, other members of the "protected classes". Also, the service of the Committee is to extend well past the three years explicit in the Consent Decree.

The Committee, initially, had concerned itself with staff recruitment strategies, the job description and performance evaluation of the campus affirmative action officers, and affirmative action procedures. Although each college of the University had its own manner in administering its affirmative action program, the role of the Committee is to standardize pertinent processes and policies, and to oversee the implementation of said policies and processes. The Committee consists of faculty and other instructional staff members, appointed by the Chancellor, from each college of the University. The UAAC and its constituent subcommittees had been meeting consistently since December 1984. The impact of the Committee should, among other things, enhance affirmative action, emphasize fairness, and thwart discriminatory practices.

THE UNIONIZED UNIVERSITY

The role of unions can be potent in eradicating discrimination. In the area of affirmative action, the landmark USSC decision was the Weber case, where the Supreme Court acceded to a labor/management agreement. In most cases where there is an agreement to take affirmative action, there is the lurking threat of a finding of

discrimination. This typically means that a judge may impose "remedial action" which makes affirmative action appear like slow pitch softball. All of the busing orders were made after a finding of discrimination. Collective bargaining agreements were in place at CUNY prior to the advent of affirmative action. These agreements were established to protect all workers, and rule, procedures, and salary schedules established to be adhered to by both labor and management. There were also established grievance procedues in place under the collective bargaining agreement that worked well.

Problems of equal treatment in a college clearly differs for faculty and non-faculty. The major difference being the role of the P & B Committee and peer review. The confidentially that is maintained by these committees sets an easy stage for a complaint of discrimination.

In administering affirmative action, the problem with faculty centers on tenure. Obviously, there are fewer employment opportunities if there is a high percentage of tenured faculty. Some of the faculties are relatively young, so that there will be few opportunities over the next five years.

UNDERREPRESENTATION OF BLACKS AND HISPANICS

This brings me to my greatest concern in recent yeas. While women have steadily increased their representation in earning the doctorate over the past ten years, and we hope this will continue, the same had not been true for Blacks and Hispanics. The representation of Blacks and Hispanics in Ph.D. programs had been diminishing or just holding steady in recent years at relatively low levels. Within the next 20 years, there will be a turnover of college and university faculties of 500,000 positions. If there is not now, or in the next few years, an increase in Black and Hispanic enrollment in Ph.D. programs, they will be excluded, in any reasonable numbers, from college and university faculties.

Dr. Timothy Healy, President of Georgetown University and former Vice Chancellor for Academic Affairs at CUNY, had recommended that a national minority fellowship program be undertaken. This is to be a national effort to assist minorities (Blacks and Hispanics) into careers as professors. The major features of his recommendation are:

1. Mount a special effort by faculty to persuade talented Black and Hispanic undergraduates to pursue the professoriate.

2. Identify and help those Black and Spanish speaking undergraduates to enter and pursue professorial graduate instruction; (not to select weak students: there are 12 million undergraduate students, one million are Black and Spanish speaking, several thousand of these should be made welcome to professiorial graduate instruction, especially in the hard sciences).

3. This should be undertaken for a decade, and would cost less than a battleship.

TABLE TWO

Doctorate Conferred*
All Fields, National

Year	Total	Women	Minority	Black	Hispanic
1940-49	17,659	8.3%	2.6%	0.7%	0.2%
1950-59	53,044	6.7%	3.8%	0.8%	0.2%
1960-69	103,854	8.2%	6.7%	0.9%	0.3%
1970-74	77,523	12.2%	10.1%	1.4%	0.6%
1975	24,958	23.7%	10.3%	4.2%	1.4%
1976**	29,731	24.4%	7.7%	4.1%	1.4%
1977	25,889	26.3%	10.8%	4.6%	1.8%
1978	24,967	26.5%	11.4%	4.4%	2.1%
1979	25,122	28.6%	11.5%	4.4%	2.1%
1980	30,982	30.3%	9.0%	3.5%	1.6%
1981	25,180	31.5%	11.1%	4.4%	2.1%
1982	24,884	32.4%	11.3%	4.6%	1.5%
1983	25,564	33.6%	10.7%	3.9%	2.4%

*National Research Council of the National Academy of Sciences

**Office for Civil Rights of Department of Health, Education and Welfare

CONCLUSION

CUNY has shown progress in affirmative action efforts. Whether progress diminishes discrimination complaints or satisfies everyone, one could never know. Eleanor Holmes Norton, when she was the Chair of the EEOC, in responding to a question about the volume of complaints said, "If we get a great deal of complaints by women and/or minorities concerning a specific contractor, we know at least there are women and/or minorities present, in order to complain."

The Chronicle of Higher Education recently issued a national report about average salaries of faculty by college and by sex. The average CUNY College appeared favorably regarding the salaries of men compared to women; I believe much of this is due to salary schedules established under collective bargaining agreements.

In my experience, the UFT, L.C. UFCT, PSC, and D.C. 37 have been good for women and minorities, based on being good for all members. Unfortunately, other unions do not have such favorable records, especially those in the skilled trades.

The proposal by President Healy would, in all likelihood, receive little attention by the current Administration in Washington, DC. However, it seems to me that it is a proposal that should be of interest to the AAUP and the AFT.

VII. SYMPOSIUM OF COLLECTIVE BARGAINING IN COMMUNITY COLLEGES

A. MUTUALLY BENEFICIAL COLLECTIVE BARGAINING IN A COMMUNITY COLLEGE

B. THE MASSACHUSETTS COMMUNITY COLLEGE SYSTEM

C. THE PHILADELPHIA COMMUNITY COLLEGE SYSTEM

SYMPOSIUM OF COLLECTIVE BARGAINING IN COMMUNITY COLLEGES
A. MUTUALLY BENEFICIAL COLLECTIVE BARGAINING IN A COMMUNITY COLLEGE

Stuart Steiner
President
Genesee Community College

"THE CHOREOGRAPHY OF COLLECTIVE BARGAINING"

The process of collective negotiations or mutually beneficial bargaining or bargaining by any other name will differ from college to college — and can differ from year to year at the same college. However, before you can discuss variations and alternatives to the traditional collective bargaining process — one must understand some basic concepts about bargaining that I might label "The Choreography of Collective Bargaining".

The collective bargaining process, in general, might be fairly described as being very similar to a ritual or a well designed dance production. In bargaining, many things that happen which give the illusion of being spontaneous are often all part of a well planned choreography. For example, one of the old time honored beliefs is that you should not come to an agreement too early in the negotiating process game, for, if you do, this action could have some long term negative effects. Lengthy and time deadline negotiations were part of the standard ritual that many people feel must be gone through in order to come to a final contract agreement.

To fully understand this, it must be remembered that negotiation is not a process of reason. The process is neither reasonable nor is it logical, but it is, to a large extent, a process of structure and planning. The process does have many sociological and psychological as well as political aspects associated with it. The chief negotiators for both sides must be fully cognizant of the various aspects of work during the negotiation process.

It is also important to remember that negotiation is not a win or lose situation. The name of the game is agreement. The purpose of negotiation is to bring about a fair agreement for your side. If you think in terms of "winning," you may indeed win one year when all circumstances are on your side. But you could lose it all next year, if you are successful in an overkill. We need to remember that collective negotiation is indeed a bilateral decision-making process where representatives of the faculty and of the college must come to some

mutual agreement on items that are listed in the body of the contract. It has been said that the best contract is one where both parties are "mutually dissatisfied" with the terms of the contract that they have finally agreed upon. Many people also believe that theoretically the best contract is one that is made by two parties with the strongest disagreement — since the concept is that a contract is a legal document that bridges differences.

Typically, the "adversarial" or what Dr. Birnbaum calls the "competitive" bargaining approach is used to resolve these differences — but there are some mutually beneficial approaches that may help you reach the same end result — without increasing the negative costs that are frequently associated with the adversarial approach.

NONTRADITIONAL COLLECTIVE BARGAINING: MUTUALLY BENEFICIAL COOPERATIVE BARGAINING

A. The Genesee Community College Experience

While I will use the Genesee Community College's experience to illustrate some of the concepts — they are concepts that might be adopted anywhere that has the right atmosphere, and where some proven positive attitudes exist among both the faculty and administration. Genesee Community College is one of 30 State University of New York (SUNY) community colleges. In the SUNY system, each community college has its own governing board — a nine-member board of trustees (plus a student trustee) — and a local sponsor — in most cases, the sponsor is either a single or several counties. The legislatures of these counties are the legal employers of all community college employees. Collective bargaining is done under the Public Employees Relations Act, commonly known in New York as the "Taylor Law". The fact that the legal employer is the sponsoring county not the board of trustees presents a whole series of potential problems. With this very brief background, let me move on to discuss mutually beneficial collective bargaining within this setting.

B. The Adversarial Model

The traditional approach to collective bargaining has been the "adversarial model". This approach has traditionally been associated with big business and big union labor negotiations. Using this approach in a community college setting, after a certain point of time passes, with no resultant contract, the union may feel it needs to put some pressure on the college and they may do informational picketing, go on strike in some states, publish information in a local newspaper, and even start a public relations campaign — frequently a "negative" one accusing the board and administration of such things as inefficiency, insensitivity to student needs, not providing the necessary resources to give the students the right educational experiences, etc.

All too often the board counters with statements about the easy work year of faculty, and other types of negative remarks such as the lack of productivity of faculty. Who do the newspapers, radio and public believe? Unfortunately, especially in a local community college setting, they are happy to believe both sides — with the result being a major negative image for the college — within its service area. Genesee went through this type of "negative" negotiations in 1977 — after eight years of negotiations that were generally satisfactory with fairly standard "give and take" situations.

A reduction of staff, under the retrenchment provisions of the contract, led to new union leadership with an avowed "we'll get them"

attitude. The results of this negotiation approach was satisfactory neither to the college nor to the faculty. Suffice it to say, the 1977 negotiations were bitter. For contract negotiations in 1980, we felt that there must be a better way to approach this process — one that would benefit the college as a whole. We felt that we could do this if we could find a way to get the board, county, and faculty the things they most needed in order to get the contract approved. We felt that we could only get to this point if we didn't approach bargaining from a "winning" or "losing" situation.

C. The Timing of Negotiations

In addition, when using the normal "timing" process of negotiations — little or nothing generally happens until a few weeks before or after the present contract expires. "Timing" is a key concept within the negotiations process, especially in terms of getting things resolved early. Generally, it is difficult to get things done early during the negotiation process. However, we settled all the issues of our 1980 contract five months before our old contract expired. Some of the timing problems tht arose involved dealing with feelings such as these:

1. "If the faculty accepted so early, we must have given away too much." (County Legislature)

2. "There is no hurry to ratify the contract since there are still 5 months left on the old contract." (County Legislature)

3. "If the college is willing to give us this much now, if we wait another 4 or 5 months we can get more." (Faculty) (The board might take the same view about the faculty).

Why should we be interested in cooperative bargaining? Our experience shows that both the college and the faculty suffered some major negative aftereffects from the adversarial approach, where confrontation instead of cooperation was the major tone of the 1977 negotiation sessions. The adversarial model presents many opportunities for divisiveness during negotiations and, just as important, for negative feeling during the period of contract administration.

D. Concepts in Mutually Beneficial Cooperative Bargaining

1. The Trust Factor

Mutually beneficial cooperative bargaining needs several key ingredients to be successful. First and foremost is mutual trust. Then there must be an intent to cooperate and a clear communication of the desire and intent to cooperate. When you communicate this intent you have the start. If the other side has no interest — you haven't lost anything. If you find someone on the other side of the table that is responsive, you have fertile ground to continue to explore bargaining under this concept. If you want to move forward, you need to consider breaking some old habits.

2. "Laundry Lists"

There is a great temptation to put everything in your contract proposal you ever dreamed of having. However, this is an easy approach. You must analyze your "laundry list" of items and separate out your needs from your desires. For the most part, you should get rid of most of

those items in the desire area and focus in on the needs area. Otherwise, the package could seem so offensive it could eliminate the whole concept of mutually cooperative and beneficial bargaining.

You must also explore the situation to determine if there are some mutual areas of interest to both the faculty and the college. The common bargaining wisdom of the late 1960's and 1970's was to ask for 50 to 75 items and try to get 5 important ones. Under a cooperative approach, you may come to the bargaining table with only 8 or 9 items and may still get the same 5 key items. If you come in with 50 to 75 items, you may end up with 18 months of trouble because there is a real reluctance to give up on any of these "important" items and thus a real reluctance to get to the end of the bargaining process.

Not only do you have to analyze your own proposals in terms of needs and desires, but you need to analyze the faculty proposals in the same light. You shouldn't start with a totally negative attitude about any of the proposals. You must analyze and assess them in terms of potential impact, benefits, etc.

3. Trade-Offs

At Genesee, in 1980, the centerpiece of this whole approach was FICA II. The desire to cooperate was communicated and there was a receptiveness communicated back to us. The college understood the need of the faculty to get a good raise, but also was aware that the county had limited the pay increases given to its own county employees. The faculty union was aware of this situation. The union also wanted a package of improved health benefits, most of which all state employees already had, but few of which existed among county employees. The college wanted to increase faculty workload but this was strongly resisted by the faculty. We also desired to have a long-term contract for all of the money saving, time and energy saving, and all of the psychological benefits a truly "closed end" long-term contract can bring.

After seven sessions — two of which consisted of lunches, one breakfast, one dinner meeting and three over the table — a four-year contract was developed and overwhelmingly approved by the faculty, the board of trustees and by a 6 to 3 margin of county legislators.

FICA II, the payment of the employees' share of FICA, was bargained for instead of the 8 - 9% raise that the faculty had anticipated. The college saved dollars on this (approximately $60,000 over the first four years) since the law provided that you did not have to pay FICA on these FICA payments. We were able to do this because we understood the faculty's need for more dollars and wanted to get the dollars to the faculty. They would have preferred a straight salary increase but understood our problems with the county and so we could come to this agreement.

We were then able to utilize the money saved by FICA II to buy some of the health benefits we wanted to give the faculty which were similar to some that they were seeking. However, we could only do this over a long period of time. Thus, we conveyed our need for a long-term contract in order to phase in the health benefits over a four-year period. In addition, we needed some increased faculty productivity in the form of increased teaching load to sell the package. We added an increase of one contact hour in the third year and one more in the fourth year to increase the teaching load to an annual count of 32 credits or 38 contact hours annually. Provisions were also made to waive the tuition for spouses and children attending the college full-time.

There was an increase in life insurance coverage and disability benefits. These were areas of concern we had due to some recent deaths and serious illnesses of faculty and staff members.

"BOTTOM LINE GOALS"

The so-called "bottom line" is this: There were several goals the college had set for itself and we were able to accomplish them, especially in maintaining a number of clauses in the contract that had been helpful to us over the years. It was a contract that allowed us to maintain a continuing four-year renewable contract instead of tenure and that also allowed us to keep a retrenchment clause that had proved to be workable over the years — one that worked so well that we have had a handful of "voluntary retrenchment" cases.

A. Contract Administration

The results of the 1980 negotiations can be measured in improved faculty/administration and faculty/board relations. In addition, one of the unsung benefits of a mutually beneficial, cooperatively developed contract is a positive approach to contract administration whereby over the four-year contract period, there were less than five grievances — none of which went beyond the second stage meet-and-confer level.

Another major outcome was the ability to parlay the use of this experience into an offer to meet with the union leadership at the end of the third year of the contract in order to extend the present contract if we could limit discussions to only dollars. We agreed that the sessions to discuss this would be informal and neither side would bring in our professional negotiators.

After three meetings, we agreed to extend our present contract for two years — until August 31, 1986. Again, there was communication of our interest and intent to cooperate. There was an understanding of the faculty's need for additional dollars. The faculty understood my desire for an extended contract and my limitations to increase their salary by straight dollar or percentage increases. They also knew that the college wanted to address some salary inequities that normally could not be addressed within the bargaining process.

B. Discretionary Salary Increases - "Sharing the Wealth"

The provisions of the contract extension were somewhat innovative but, once again, met our individual goals and those for the college as a whole. Salary increases were based on cost of living, but with a maximum of 7.5% and a minimum of 5.5% each year. In addition, there was a 1% presidential discretionary fund (1% of total salaries) that was for the exclusive use of the president to increase faculty salaries. The funds were to be given to unit members only. In addition, another 1/2% of discretionary funds would be made available if a certain enrollment target was hit. It was a concept of "sharing the wealth". If we could increase our enrollment and generate more revenue, we would share some of this revenue with the faculty.

This is a concept that is worth exploring in future contracts and using as one of the centerpieces of negotiations. There were some minor adjustments of the contract and I am sure that the faculty was relieved that the FICA II concept would not have to be reviewed once again by the County Legislature. For the College, the goal of having some discretionary funds free to provide selected faculty and staff members with some well deserved salary increases that, in some cases, were much needed in terms of equity, was met.

One side note on the discretionary increases. This is the only time in almost a decade of service as president of Genesee Community College that I received unanimous encouragement, even insistence, that the president take full responsibility and take full credit for selecting the recipients of the discretionary funds. The union didn't want to take any credit and even the deans strongly felt that it would be better if the president didn't give them any credit for input into who received the discretionary increases. Fortunately, phase one of the discretionary increases has worked out fairly well.

CONCLUSION

I have undoubtedly oversimplified the process that we went through in our mutually beneficial collective bargaining process. I totally agree with Dr. Robert Birnbaum's view that this type of bargaining is far tougher and more demanding and a much riskier process than the traditional bargaining approach. It is indeed an exciting, focused, problem-solving approach that is not found in the traditional bargaining setting.

It is, however, an approach to bargaining that can leave all parties feeling a lot better about themselves, the institution and the people they work with after all of the bargaining is concluded. My goal is to get another extension of our present contract. In a couple of years, if I am successful, I'll stop back and tell you how things worked out.

SYMPOSIUM OF COLLECTIVE BARGAINING IN COMMUNITY COLLEGES
B. THE MASSACHUSETTS COMMUNITY COLLEGE SYSTEM

James F. Rice
President, Massachusetts Community
College Council, MTA/NEA

This afternoon I would like to address collective bargaining in community colleges from the perspective of a president of a statewide, fifteen campus, 1700 member union in the following areas: a thumbnail sketch of the Massachusetts higher education system, an overview of the last negotiation process, and some significant aspects of our current agreement.

COLLECTIVE BARGAINING IN THE MASSACHUSETTS HIGHER EDUCATION SYSTEM

I've been involved in negotiations since 1976, through four contracts. The first two contracts, 1976-77 and 1979-80, were negotiated under what I call the old system. That system had separate boards. The five universities had their own board, the nine state colleges had their own board, and the fifteen community colleges had their own board. It also meant that the union and the respective management components were in close contact with one another. I would suggest to you that the first two contracts in the Massachusetts Community College system were meritorious and acceptable to both sides.

In 1981, there was a significant reorganization in Massachusetts. We went to what is called the Regents System. We had a chancellor, a board of regents, under which now fell the university, state colleges and community colleges, as one system. An added sidelight to the single employer definition was that each one of these schools, twenty-eight schools in total, had its own individual board of nine trustees.

The third contract was negotiated under this new system. The change destroyed the former close proximity of the two principles, the union and management. Under this contract, we saw an increase in both regents and legal staff. I do not wish to go into the history of that contract; it was eventually ratified, but it was not a very good contract. The stage was now set for the current negotiations. Negotiations with the employer lasted seventeen months, through one hundred sessions, and three different chief negotiators from management's side.

The regents requested mediation. Five mediation sessions were held; at this point, fifteen articles were still open. The mediator certified for fact-finding, engaged in the fact-finding process along with us under Massachusetts law. The union took a total of thirteen hours of testimony and management took two hours and requested an additional two hours of rebuttal. The fact-finder's report was some eight weeks in coming. However, almost before it was finished, both sides were quick to say that they would accept it in full.

THE NEGOTIATIONS PROCESS AND RESULTS

There was a change in the law that altered collective bargaining in Massachusetts which took the problem-solvers apart from one another. Many changes were suggested in the fact-finder's report. Among the more significant ones were the following:

1. One of the first things the fact-finder did was to create within the contract what he called a Joint Study Committee composed of four management appointees and four union appointees, with two very specific tasks: governance and part-time employees. There was an option to include other issues that this Joint Study Committee would mutually deem necessary.

2. The governance issue is pretty straightforward. The recommendation was for a fairly open model of governance.

3. The issue of part-time employment, however, is a very critical issue and will be taken up next month. Basically, in the Massachusetts Community College system, we have sixteen hundred professional staff and faculty. We now have seven hundred and five part-time employees teaching anywhere from one to three courses. There is, in the view of the union, serious difficulties of quality control, hiring mechanisms, pay, and other issues consistent with an unorganized group.

4. Another area that the fact-finder improved upon in the contract was that management rights would be grievable through arbitration. The standard is arbitrary, capricious, or unreasonable. The new element is the unreasonable standard.

5. An area that was somewhat glossed over by the fact-finder but an area of hot contention was the supplementary benefits. He glossed over them only to say that the pay was more important. He also, while he was talking about pay, said merit pay did not belong in the current situation, meaning the Massachusetts Community College system. However, under supplemental benefits, there was created what is known as Health and Welfare Trust Fund. It's a mechanism whereby the employer makes contributions to the union and then the union establishes its own Health and Welfare Trust. What we have done in Massachusetts, one of the few times on the union side anyway, is the universities, the state colleges and the community colleges have come together to create a mega-trust Health and Welfare Trust of 7,500 members.

6. A significant advancement, one which at least for our system was significant, was tuition remission. Now employees, the spouse, as well as the offspring, will go tuition-free to any public school of higher education in Massachusetts. You still have to pay the fees. In the area of DCE, which is continuing education for all levels, you have to pay half the tuition.

7. In the area of workload, there was a demand to increase the workload to fifteen hours. We are currently at twenty-four units of instruction, or two preparations. We also have a workload formula which

takes into consideration your teaching time, your prep time, your college service time, as well as your committee and advising time. All of those are computed. You can, on paper and in reality, easily justify, if you wanted a thirty-seven and a half hour workweek. Many faculty and professional staff are sensitive to the fact that they were doing a lot more work than was required of them.

8. Another area that was rather successful was the area of the multiple year contract. We've lived under the multiple year contract since the late seventies when high tech had great influence in educational matters in Massachusetts. As a result, that concept was highly touted as a way to keep new employees, or well trained employees. At the end of a multiple year contract, I guess you would turn them over if they were no longer useful. We went on at length to indicate that education is a profession. It does require dedication. We thought that a four year probation period was more than enough. And on this basis, the multiple year contracts of one, two, three and five should be eliminated.

9. The evaluation system remained the same. The evaluation system is grievable through arbitration both in terms of the substance as well as the process. Narratives are required; there is no standardization for an evaluation. It must be personalized to your student evaluation, your course materials, and the classroom observation. In addition to classroom observation, a person can, upon request, have a pre-observation or post-observation conference with the division chair. You can also have reasons for your evaluation upon request.

10. The other areas that were significantly impacted were seniority and salary. There are two areas of seniority: institutional and work area. institutional refers to the total years of employment. Work area seniority is computed upon the premise that if you've taught eight sections in another work area and you're in an area of retrenchment, you can apply your institutional seniority to that area, if qualified. The philosophy behind this was that having been evaluated for so many years and receiving favorable evaluations, this should, in the final analysis, count for something. This system does protect good veteran teachers.

11. The final area is the salary benefit area, some of which I have already touched upon — Health and Welfare Trust Fund, and the tuition remission policy. The total financial package was 36.8 percent. The increase on the base rate for this contract of the average faculty member is 33.52 percent professional educational needs. What that translates to in each year of the contract is, this year a minimum of $350 for your own professional development and next year, it'll be $175. That's a one-time-bonus kind of situation. You can do just about anything you want with your money prorvided you can justify it as professional development. It could be more, but it's a minimum of $350 depending on the number of participants at the college. It's set up by pools.

SUMMARY

In addition, we did manage to have a college-by-college equity study which consisted of a review of your pay relative to your years of service in regard to other people who had been at the institution for the same number of years. If there was a four-step differential, you would be entitled to money sufficient to bring you within the four-step differential. In the financial package, there were a significant number of promotions made available. For the total three year period, there were 778 promotions made available. A promotion is worth basically $1000 the first year of the contract, and because of the factoring in of the

compounding of the base rate, it goes to $1200 in the second year. We also made some retroactive promotions available. Since some people had received promotions at the old rate, we put forth half-steps to bring them up to this year's rate of $1000. We put forth ninety-six retroactive half-step promotions and made available 141 additional half-step promotions.

By way of closure, I would suggest that reorganization of the state university system in Massachusetts introduced too much legal influence and not enough educational problem-solving between the employer and the employees. The fact-finder recognized this incongruity and attempted to remedy the problem by extending opportunities to the college presidents to get involved in decision-making directly through the Joint Study Committee. Further, professional decision-making was opened to third party review (arbitration) as were almost all contract articles with the standard of arbitrary, capricious or unreasonable clauses. In addition, salary and supplemental benefits, and upward mobility were significantly enhanced.

Workload and evaluation were preserved ensuring quality education to the students and taxpayers of the Commonwealth of Massachusetts.

SYMPOSIUM OF COLLECTIVE BARGAINING IN COMMUNITY COLLEGES
C. THE PHILADELPHIA COMMUNITY COLLEGE SYSTEM

Karen R. Schermerhorn
Co-President, Faculty Federation of
Community College of Philadelphia/AFT

INTRODUCTION

Steve Brier, Chief Director of the American Working Class History Project at CUNY recently commented: "Community colleges are at the cutting edge, where higher education is coming the closest to using the methods of the factory." Historically, the methods he referred to involved changes for the worse that occurred when workers, for example, were gathered into a factory under the supervision of formen. As a result, they lost control of many aspects of their work. The history of the loss of worker control is useful in the exploration of today's trends which include turning the community college faculty member from a professional to a factory worker by changing his working conditions and by considering the community college student not as a whole person to be educated but as the recipient of a standardized vocational training or a miscellaneous collection of courses totalling 62 credits.

THE FACULTY UNION

The community college union can work against these two developments and, in so doing, aid in the pursuit of excellence.

The role of the faculty union in keeping the faculty member a professional and thus preventing faculty alientation resulting from loss of control remains critical. Faculty unions must keep our faculty from experiencing losses similar to those encountered by the hatters and other workers and also to keep our community colleges from becoming more like factories. This can be done by the following:

1. by promoting versatility of faculty, i.e., not letting the division of labor become so great that we lose the job satisfaction of seeing a whole task completed well;

2. by controlling the use of machines, e.g. computers, in the educational process; and

3. by controlling work rules as much as possible.

History shows it is better to be a versatile worker who can, as much as possible, complete all parts of a task. Not only is there more worker satisfaction, but also we have found that the versatile professional, with many skills, does a more effective job of teaching. To illustrate: a few years ago, at Community College of Philadelphia (CCP), the order came down to the English Department that all new hires had to be "specialists", i.e. have degrees in reading or speech. The faculty resisted. First, we used the power of our faculty hiring committees, guaranteed in our Full-time Faculty contract, to recommend only people who, though they had degrees in reading or speech, could also teach our basic writing courses. Also, we encouraged all English faculty, even the ones with degrees in literature, to learn to teach speech and reading. We also suggested that teachers sign up for block scheduling, so they could teach speech, composition, and reading courses to the same students or to work as part of a team of teachers with these students.

In a more recent development, we encouraged "Writing Across the Curriculum", so that faculty in content areas, even science and math, emphasize reading and writing skills in their courses. We are learning that these methods result in improved student performance. An even more significant development occurred this year when faculty members at CCP were awarded a major Ford Foundation grant for the creation of a broad new curriculum aimed at dramatically increasing the success rate of community college students who transfer to four-year institutions. Essential to this curriculum is the breaking down of artificial distinctions between courses and disciplines and emphasis on the students' learning to ask seminal questions.

A. The Hiring Process

In support of teacher versatility and of teaching quality, our union's role has been to win decreased class loads and class size; to win hiring rights for departments; to win a wide array of instructional rights for departments; and to encourage faculty to exercise these rights even as some administrators try to impose narrow educational roles. I'd like to expand on each of these a bit. First, I believe our winning decreased class size for all of our faculty and a 12-hour semester load for most of our faculty has made possible the significant improvement of curriculum and teaching that led to the faculty's winning the Ford Foundation grant. Significantly, a large part of the grant will be used to give faculty released time, reducing their loads below 12 hours per semester to enable them to change their teaching methods radically.

Our union has also won hiring rights for our departments, and I've already mentioned how full-time faculty have used these hiring rights to ensure the versatility of their new colleagues. This year, however, the union is seeking to expand these rights to give full-time faculty the right to hire new part-time faculty. This semester, our part-time faculty, formulating their own contract demands, proposed that the preference part-time faculty have traditionally enjoyed for hiring into full-time positions be formalized in the part-time faculty contract. This change required agreement of the full-time faculty, who, after much debate, would not agree to relinquish any of their hiring prerogatives, even for currently teaching part-time faculty. The reason most often given by full-time faculty was this: part-time faculty are less qualified. This excuse continued to surface, even after it was pointed out that (1) if part-time faculty are not qualified, they should not be teaching at all; (2) if part-time faculty have been teaching a department's courses for ten years, it is unreasonable to say they are not qualified, except in unusual circumstances; and (3) all current part-time faculty have been hired — and rehired and rehired — by department heads, elected by and from among the faculty. Thus, the importance of our proposal that all

new part-time faculty should be hired only after the same type of review used for full-time faculty. We must put an end to any irresponsible hiring of part-time faculty who teach our students and help create our College's reputation; and we must put an end to the excuse of the "double standard" which undermines our efforts toward quality in the classroom. Once we win the right to a full hiring committee review of new part-time faculty, we hope backward attitudes toward part-time faculty will change, so that in future contract negotiations the part-time faculty will get full-time support for a contract proposal giving part-time faculty preference for full-time positions.

B. Automation Factors

A second way of keeping the faculty member a professional and preventing factory-like methods is to be sure that machines, e.g. computers, are used only as a supplement to trained professionals. An administrator in our Science Division recently received a grant for teaching a large number of remedial math courses through individualized instruction with computers, not in the classroom but in the Learning Lab, where, according to the plan, the teacher's role would be reduced to monitoring student completion of assignments and, it was privately acknowledged, could even be eliminated in the future, with the instructor being replaced by a lab aide. Our mathematics faculty are in the process of resisting: first, by participating in the experiment, they have been able to show that this method does not teach real understanding of mathematical processes. A clause in the Full-time Faculty contract protects the faculty's rights to choose teaching methods and our union has encouraged faculty to exercise them in their search for the best educational results.

C. Work Rules

A third area where unions must exert pressure through contracts to keep community colleges from becoming factory-like is control of work rules. Here is where it is important for a full-time faculty union to organize part-time faculty (as our union at CCP has done). Some part-time faculty have lost control over decisions that are crucial to their performing their best work. Examples include:

1. Departmental decisions on course objectives through not being invited to department meetings and not being allowed to vote within the department.

2. Choice of textbook: this right is so important to excellent teaching that it was mentioned in the report of the National Commission on Excellence in Education.

3. Choice of work pace, i.e., the freedom to construct a syllabus, and to decide on the number of assignments, in accord with the teacher's best judgment of how the course material should be presented to the students in question.

4. Choice of instructional technique: CCP has recently witnessed a controversy about the "conference method" for teaching English composition. In the past, the teacher, using his own judgment, had decided on the best "mix" of classes and conferences based on the skill level of the class and the needs of individual students. This right was challenged by the CCP Board and administration, who cited a student complaint about the smaller number of class hours.

The teacher's right to make educational decisions was upheld as a result of departmental pressure, backed up by the union contract.

Furthermore, recent commentators support the value of worker control. By now, we have all heard of Thomas J. Peters' and Robert H. Waterman's, In Search of Excellence, one of whose principles is encouraging the autonomy of workers so that, given some control over their work, they will energetically seek ways to excel (p. xxi). K. Patricia Cross has written an intriguing application of the Peters-Waterman principles to the classroom in which she underscores the importance of the teacher's customizing instruction to the student, especially to the non-traditional student, if that student is to succeed (p. 8).

Keeping the community college faculty member from becoming more like a factory worker and enjoying instructional freedom is important. Not only can it prevent alienation of the teacher from his work and promote job satisfaction, it also encourages the teacher to work at his best.

THREATS TO EXCELLENCE

At this point, one might ask: Why are these inroads occurring in community colleges — pressure for faculty specialization; attempts to introduce machines; attempts to rigidify the instructional process by weakening the choice of text, the choice of instructional pace and the choice of instructional technique? The answer may be related to the fourth and last role of the community college union that I will mention: to prevent the graduate from becoming simply a cog in the system of production and, instead, to encourage the student to develop to his full potential. As Rich Klimmer, an American Federation of Teachers National Representative, has pointed out in an article, "Corporate Power and the Community College", industry in the 1960's began to rely on community colleges to train its workers. In the process, many junior colleges which had enrolled working class students and emphasized the liberal arts to prepare students for four-year colleges, became community colleges, also, of course, for working class students, but which often emphasized narrow vocational training with few courses in the theory behind the job skills, let alone any liberal arts courses with critical content, or even any general education component.

I'd like to suggest that it is because of their working class and minority students, who are considered inferior, that community colleges have been given second class status intellectually and that attempts have been made to take away faculty control over some instructional decisions. These actions have been taken not only in the false belief that community college students are not up to the challenge of real academic work but in an attempt to be sure that community college students never get the chance to do real academic work. As those of us who teach in community colleges are aware, our students are bright and alert, though many are badly prepared for college-level work. First, they need remedial courses and skills. Second, they need to learn not only a skill, an occupation, but they need to be educated in critical thinking, able to understand their role in society and, therefore, less likely to end up in a low-paying and/or non-union job in which they have little control over their working conditions.

So that our students will be educated to their full potential, the community college union can and should negotiate control of curriculum and control of course content in all (including vocational) programs, first, to emphasize understanding of the theories behind job skills and, second, to include more liberal arts or at least general education courses so that students will learn to think and to learn, not just learn a skill. There has been a lot of discussion at CCP because, in some vocational programs, especially in the health professions, outside boards set

requirements for so many technical courses that there is no time for even general education courses. At a recent In-Service meeting on general education, a top CCP administrator stated it didn't matter whether vocational students were allowed to take liberal arts and social science electives since, as he put it, "any subject can be taught broadly or narrowly". While this is true, if we adopt this position, we are avoiding the responsibility for insisting, against the tide, on something more than narrow, vocational education for everyone, an education that includes standard courses in academic subjects, courses not academically "watered down" for the supposed lower intelligence of our students and which actually deprive them of the real opportunity to learn. Once the union has negotiated rights for the faculty to set curriculum requirements, then the faculty can set requirements they believe are necessary for students to learn to be responsible citizens and whole people. The union should encourage faculty not to accept passively outside boards' requirements. At CCP, we are exploring a number of ways of including general education requirements, not only within all curricula but also for part-time students and students whose goal is not to earn a degree: requiring additional general education courses; rewriting current required and elective courses to include more general education; and adding general education components to career courses; as well as enriching course work with out-of-class educational experiences. This emphasis on quality and on teaching workers to think is in line with the report of the National Commission on Excellence in Education and will become more important as more adults return to college to retrain.

CONCLUSION

Though other subjects of collective bargaining such as salaries and fringe benefits are important, the nature of the community college, its students, and the jobs they are supposed to fill creates a stong need to resist the erosion of faculty rights, rights that enable commuity college faculty to have control over their work, take pride in it, and create conditions for teaching excellence. This control is important — not just because faculty are happier when they have conditions that allow them to work at their best but also because with this control they can help community college students to become all they are capable of being.

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BY WHOSE RIGHT? MANAGEMENT RIGHTS AND GOVERNANCE IN THE UNIONIZED INSTITUTION

Margaret K. Chandler
Professor, Graduate School of Business
Columbia University
and
Daniel J. Julius
Director, Employee Relations
California State University

OBJECTIVES OF THE RESEARCH

This research examines the effect of collective bargaining on the sharing of authority in two-year and four-year colleges and universities. We have concluded that it is impossible to comprehend this problem without structuring it in terms of rights issues, for complex rights questions are part and parcel of the faculty-administration relationship. This type of bargaining does not begin in the industrial fashion with one party (management) in possession of a fund of rights which the other party (union) attempts to acquire. In academic collective bargaining, especially in the four-year schools, both parties come to the negotiating table with their separate but overlapping bundles of rights. Each claims prior jurisdiction over similar prerogatives, functions and duties.

The phenomenon we are studying is of growing importance. Before 1966, there were almost no collective bargaining agreements in higher education. However, by 1985 one out of every three professors and professional staff members had joined unions, 191,000 persons in all.

Although a voluminous body of literature is devoted to the consequences of academic unionism, few studies have made an in-depth analysis of bargaining agreements. Instead, many studies of faculty bargaining are based on attitudinal surveys, which are notoriously poor predictors of behavior. If attitudes are poor predictors, it is also true that contract language may not mirror actual behavior. The parties may ignore or misinterpret a given clause. However, it still stands as part of the agreement. The parties debated its wording and placed it in the contract with the understanding that both of them would abide by it. If a dispute arises, the language becomes critical in the determinations of arbitrators and judges.

Our first goal was to assess the extent to which faculty associations are penetrating certain management functions or rights. Conversely, to what extent are administrators asserting their rights in

the agreement?

A second aim was to determine the impact of academic unionism on traditional "faculty rights". As professionals, the faculty also have a managerial role, e.g., setting standards for performance and evaluating performance. As union members, what are faculty doing with their traditional professional rights? Are they placing them in the contract or trading them off for other items?

We sought to develop predictors of the extent of faculty association penetration into management areas. We tested a number of institutional and demographic variables: region, state, agent, size (by student enrollment and size of faculty), affiliation (public vs. private), institutional type, quality of the existence of enabling legislation, age of relationship, agent stability, first or later contract, status of department chairman (in or out of the unit), and institutional ranking on salary, to determine if these factors were associated with stronger or weaker faculty or administration voice. (See Appendix I)

METHODS AND TECHNIQUES

In seeking answers to the questions we raised, we selected for study seven crucial areas which are at the center of the rights struggles in organized institutions of higher education. Two represent key administrative decisions: long-range planning and retrenchment; four represent key personnel decisions: promotion, appointment, nonrenewal, tenure; and the seventh was the issue of management rights.

We then proceeded to conduct a comprehensive analysis of these issues in 285 four-year and two-year collective bargaining agreements. Our study includes nearly 90% (n=101: 50 private, 51 public) of all current four-year agreements and 70% (n=184: 178 public, 6 private) of all two-year agreements. In January 1985, the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Baruch College, indicated 395 contracts, 117 four-year and 278 two-year were in existence.[1]

We have devised a new method for scaling the agreements with regard to extent of association influence and extent of assertion of management rights. The following provides a brief description of the scaling method used in this study:

1. Each contract was read and analyzed in its entirety. All references relating to a particular clause were examined.

2. A five point scale was employed. For all clauses, the lowest rating indicated no mention of the item in question, while higher ratings indicated more faculty control over personnel and administrative policies or stronger management rights. When contracts incorporated references to state statutes or rights embodied in national documents of faculty unions, such language also was assessed.

3. Criteria used to ascertain faculty control were reviewed by several experts in the field, and the reliability of the scaling was checked through personal interviews.

4. No sampling procedure was employed. All available contracts were analyzed and scaled.

Through statistical analysis, we determined the relationship of our measures of association and admininstrative influence to our institutional

and demographic variables.

DATA SOURCE

The National Center for the Study of Collective Bargaining in Higher Education and the Professions at Baruch College (CUNY) very kindly permitted the authors to use its contract files, which constitute the most complete collection in existence.

THE TWO-YEAR AGREEMENTS

A. The Management Rights Clause

Our data indicate that management negotiators wanted language affirming their rights. All of the agreements had such a clause, and nearly 70 percent contained strong statements. (See Table 1).

Institutional size is an excellent predictor of the degree to which a contract manifests strong language. Management rights were significantly and inversely related ($p \leq .039$) to this variable. In fact, in colleges in which enrollments were under 5,000, scores on this clause ranged from 3.9 to 4.1. Institutions in which enrollment exceeded 40,000 had the lowest management rights scores. As institutional size increases, the strength of the management rights clause decreases.

Geographic region is another variable associated with specificity in this clause. Management rights were significantly related ($p \leq .001$) to region and to state ($p \leq .001$). Scores from institutions in the Midwest were highest, followed by colleges in the west. Schools in eastern states generally had weaker management rights clauses. Clauses found in colleges in Michigan, Wisconsin and Illinois reflected mean scores of 3.8, 3.7 and 4.0 respectively, while contracts from schools in New Jersey and Pennsylvania had mean scores of 3.4 and 3.2. California's two-year colleges achieved the high mean score of 4.2.

A statistically significant relationship ($p \leq .002$) exists between the bargaining agent and strength or weakness in management rights clauses. In this case, contracts negotiated by the NEA (mean score 4.0) and those negotiated by independent agents (mean score of 3.8) contrast with the lower managements rights scores found in units represented by mergers, the AAUP and the AFT, all of which had mean scores of 3.5.

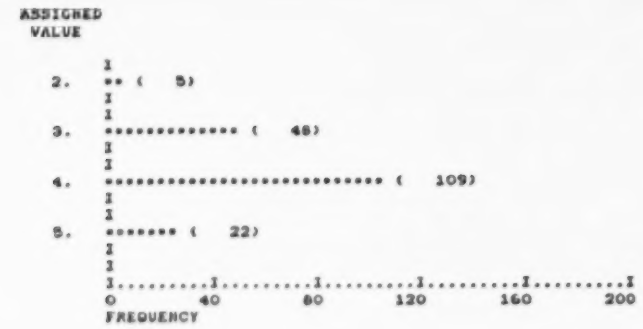
Not surprisingly, scoring on the management rights issue was significantly related ($p \leq .025$) to bargaining unit size. Smaller units, those containing under 100 faculty, had contracts boasting the strongest rights language. Institutions in which unit size ranged from 250 to 499 had the lowest mean score of 3.5.

Institutional ranking on salary was significantly related ($p \leq .001$) to the scaled means for this clause. In this instance, institutions in which the administration was able to negotiate stronger rights language fell in the lowest quartile. Faculty contracts from institutions in which employees were receiving the highest salaries were invariably associated with weaker rights language.

Our Pearson correlation findings indicate that higher scores on management rights clauses are inversely related to scoring patterns for the other dependent variables. In other words, unions that obtain strong rights guarantees on long-range planning, retrenchment, appointment, promotion, nonrenewal and tenure tend to have prevented management from obtaining strong rights language.

Table 1
Two-Year Schools

MANAGEMENT RIGHTS



MEAN = 3.804

n = 184

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

B. The Extent of Association Influence

Long-range planning and retrenchment are two administrative functions which are at the center of controversies in organized universities. Professional unions' attempts to penetrate these managerial areas, particularly in the two-year sector, has accelerated as the economic crisis in education has deepened.

THE ADMINISTRATIVE DECISIONS

A. Long-Range Planning

In general, unions in two-year institutions have not made significant advances in this area. (See Table 2). Nearly 63% of the sample received a score of 1 or 2. One-third of the sample was awarded a code of 3 and less than 4% were scored at 4. No agreement was coded at 5.

A number of independent variables were positively related to contract language. For example, the state in which faculties bargained was significant at the ($p \leq .007$) level. The strongest contracts from the union's standpoint, were found in Washington and Pennsylvania, scoring 2.6 and 2.7 respectively. Agreements negotiated in California and Wisconsin, scoring 1.8 and 2.0 respectively, were those in which faculty attained the least rights guarantees.

Scores on the long-range planning clause were significantly related ($p \leq .001$) to the bargaining agent. The strongest assertions of faculty rights were associated with contracts negotiated by the AFT and AAUP (mean score of 2.5). Agreements negotiated by the NEA (mean score of 2.0) and by mergers of agents (mean score of 1.5) reflected less specificity in the clause, i.e., less of a guarantee of a faculty role in the long-range planning function.

Bargaining unit size ($p \leq .002$) and age of contractual relationship ($p \leq .001$) also proved to be significantly related to assertion of faculty rights in this area. Faculty in middle-sized units of 250 to 499 obtained the strongest rights guarantees in long-range planning. In this instance, weaker language was associated with the smallest and largest bargaining units. With regard to the age of contractual relationship, greater age was positively associated with stronger rights guarantees. The highest scores were found in institutions in which faculty had bargained eleven years or longer. Employee salary levels were significantly related ($p \leq .001$) to scores for this clause. This finding suggests that unions which bargain well in financial matters attain strong rights guarantees in administrative areas as well.

B. Retrenchment

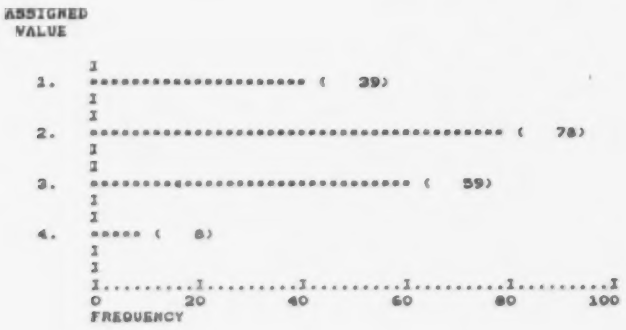
The economic crunch has caused the resource allocation decision involved in retrenchment to become a key issue. As education is a labor-intensive industry, retrenchment often results in cuts in faculty positions. This situation, in turn, has aroused professional concern about placing controls on the retrenchment process.

In contrast to the average scores awarded to the other administrative and personnel issues, the mean score on retrenchment was the highest at 2.6. (See Table 3). Nearly 60% of the sample received a code of 3 or 4. Less than 20% of the sample had no language regarding retrenchment.

Table 2

Two-Year Schools

LONG RANGE PLANNING



MEAN = 2.196

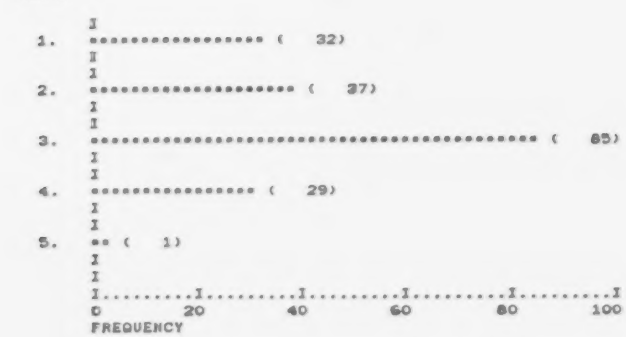
n = 184

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 3

Two-Year Schools

RETRENCHMENT



MEAN = 2.620

n = 184

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Institutional and demographic variables were associated with strength of assertion of faculty rights. Geographic region ($p \leq .007$) and state ($p \leq .007$) were significantly related to assertion of faculty rights. Contracts from the Midwest (Wisconsin, Michigan, Illinois) reflected the highest scores on this clause. Faculty in California community colleges obtained the least rights (mean score of 1.4) in this crucial area.

The bargaining agent itself was not significantly related to strength of contract language. However, when held constant with contract number ($p \leq .001$) and age of contractual relationship ($p \leq .001$), the agent's identity became an important factor. Stronger rights guarantees invariably were found in agreements that had been in place for eight years or longer. Often these agreements were bargained by the AAUP, AFT or independent agents. Agreements bargained within the last six years by the NEA or mergers, reflected weaker assertion of association rights. Finally, stronger rights guarantees were significantly related ($p \leq .003$) to schools in which faculty received higher salaries.

THE PERSONNEL DECISIONS: APPOINTMENT, PROMOTION, NONRENEWAL AND TENURE IN TWO-YEAR AGREEMENTS

In general, the four clauses dealing with personnel issues evidenced detailed procedures designed to foster professional rather than industrial union-type objectives. Academic criteria for evaluation and promotion on the job have been placed in the agreement. The standards listed represent a wide array of criteria for promotion, appointment, nonrenewal, and tenure. Some contracts specified procedures for the establishment of faculty review committees. A number of the agreements also dealt with procedures that administrators must follow should they choose to disregard committee recommendations. Strongly worded clauses required the administration to inform unsuccessful candidates in writing of the reasons for denial of advancement, and provided the right of appeal to grievants wishing to pursue the issue.

A significant finding indicates that scoring patterns for these four contractual provisions tend to be similar. Unions are not trading off rights on promotion decisions in favor of those concerning tenure. Our data show that unions invariably obtain or forfeit both. Especially strong relationships existed between appointment and tenure (.49, $p \leq .001$), promotion and tenure (.62, $p \leq .001$), appointment and promotion (.45, $p \leq .001$), and appointment and nonrenewal (.38, $p \leq .001$).

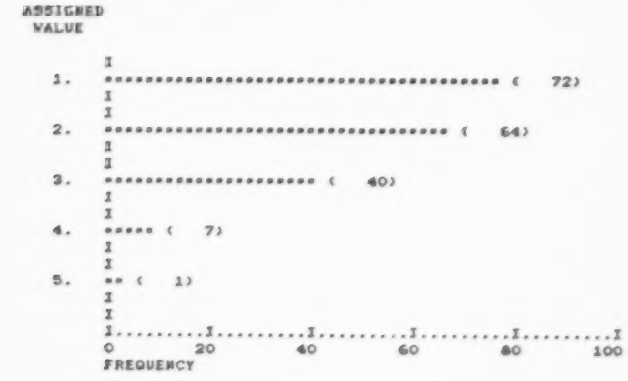
Unlike many four-year institutions, in two-year colleges the management, not the faculty, has historically been responsible for appointment, promotion, nonrenewal and tenure decisions. Traditions involving peer judgment and professional autonomy are not strong in the two-year sector. For example, nearly 40% of contracts studied did not contain language on appointment, roughly one-third had no language on promotion or nonrenewal and almost 47%, nearly half, did not include language on tenure. Even so, the fact that roughly 10% of the sample was awarded a code of 4 in these four areas indicates that changes are occurring. (See Tables 4-7).

Eight institutional and demographic variables are significantly related to stronger or weaker assertion of faculty rights. (See Table 8).

Table 4

Two-Year Schools

APPOINTMENT



MEAN = 1.918

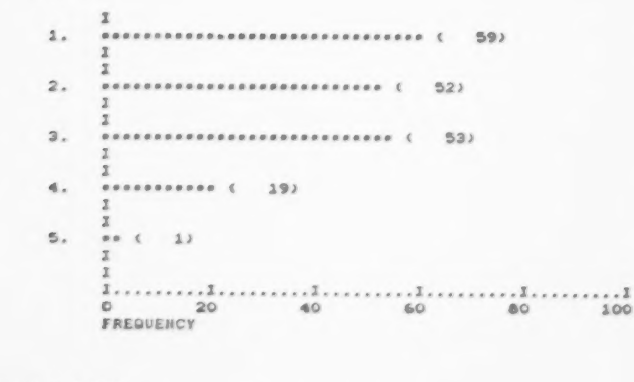
n = 184

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 5

Two-Year Schools

PROMOTION



MEAN = 2.190

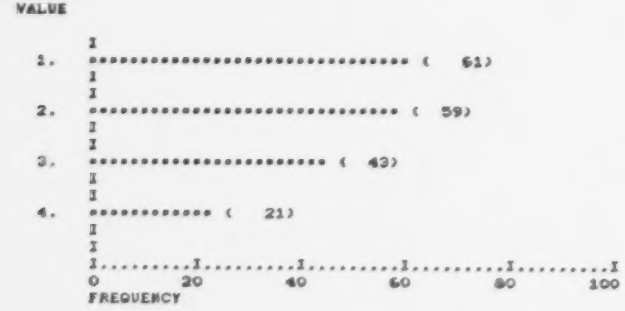
n = 184

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 6

Two-Year Schools

NONRENEWAL



MEAN = 2.120

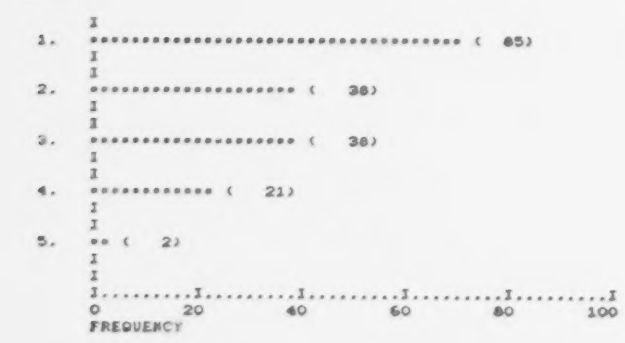
n = 184

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 7

Two-Year Schools

TENURE



MEAN = 2.005

n = 184

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 8

Statistically Significant Relationships in the Personnel area in the Two-year Schools

Appointment	$p \leq .006$ with region
	$p \leq .001$ with state
	$p \leq .005$ with agent
	$p \leq .004$ with unit size
	$p \leq .001$ with age of bargaining relationship
	$p \leq .001$ with salary ranking
Promotion	$p \leq .001$ with region
	$p \leq .001$ with state
	$p \leq .008$ with agent stability
	$p \leq .01$ with age of bargaining relationship
	$p \leq .001$ with salary ranking
Nonrenewal	$p \leq .001$ with region
	$p \leq .001$ with state
	$p \leq .004$ with agent
	$p \leq .001$ with age of bargaining relationship
Tenure	$p \leq .001$ with region
	$p \leq .001$ with state
	$p \leq .004$ with agent
	$p \leq .001$ with enrollment
	$p \leq .003$ with unit size
	$p \leq .05$ with age of bargaining relationship
	$p \leq .001$ with salary ranking

In all or most cases, region, state, the age of the bargaining relationship, bargaining agent and the institution's salary ranking, are significantly related to the union's ability to bargain personnel rights language. We were impressed with the degree to which these independent variables are statistically significant.

The key word in the industrial relations environment is leverage. Without it, a union can do little more than retain the status quo. There is little doubt that faculty in institutions with certain characteristics who are represented by particular agents have fared better in collective bargaining. (See Table 9). For example, in larger Midwestern and Eastern schools in which salary levels are high, the bargaining relationship is older, and the AFT and independents predominate, the contracts reflect stronger assertions of faculty prerogatives. In smaller Midwestern and Western institutions in which salary levels are lower, bargaining relationships younger, and faculties are represented by the AAUP and NEA, faculty unions do not or cannot attain as strong a voice in administrative and personnel decisions.

THE FOUR-YEAR AGREEMENTS

In the four-year sector, we often encountered a faculty group with pre-bargaining rights associated with peer review and traditional governance systems. Thus, the four-year faculties had an advantage that the two-year groups generally lacked. The two sectors differed in a number of other ways:

1. While the two-year contracts that we studied are overwhelmingly in the public sector, 178 versus 6 in the private, our four-year agreements are divided, with 51 in the public sector and 50 in the private.

2. Our unionized four-year sector is concentrated in the East. Sixty percent of the cases are in this region. On the other hand, 64 percent of our two-year group are in the Midwest and West.

3. The dominant national bargaining agents are not the same. The NEA (National Education Association) has 60 percent of the two-year schools, while the AAUP (American Association of University Professors) has only 2 percent. On the other hand, the AAUP leads in the four-year sector with 35 percent of the bargaining relationships. The NEA has a smaller proportion, about 24 percent. The AFT (American Federation of Teachers) has about 30 percent of each sector.

The four-year agents differ in the extent to which they are concentrated in either the public or private sector. The AAUP schools are split evenly between the two, two-thirds of the NEA's contracts are in the public sector, and two-thirds of those organized by the AFT are in the private sector.

As we analyze the results of our study of the four-year agreements, the above facts will serve to explain some of the inter-sector differences that we observed.

A. The Management Rights Clause

As in the two-year sector, all agreements contained such a clause, but the results were less favorable to management. Forty-eight percent contained strong language (code 4 or 5) in contrast to 70 percent in the two-year schools. (See Table 10). The differences between the two-year and four-year scores, 3.8 and 3.4, was significant at the $p \leq .001$ level.[2]

TABLE 9

RANK OF AGENT BY DEPENDENT VARIABLE

PUBLIC TWO-YEAR INSTITUIONS

	OVERALL	LRP	RET	APP	PROM	NONR	TEN
AFT	2.93	2.58	2.61	2.25	2.45	2.49	2.30
IND.	2.72	2.27	3.09	2.00	1.90	1.72	2.63
MERGER	2.60	1.50	2.50	1.50	2.50	2.50	2.50
NEA	2.41	2.01	2.51	1.76	2.07	1.99	1.75
AAUP	1.93	2.00	3.00	1.00	1.33	1.00	1.33

RANK OF AGENT BY MANEGEMENT RIGHTS

AAUP	4.00
NEA	3.96
IND.	3.81
AFT	3.52
MERGER	3.50

TOTAL n = 178

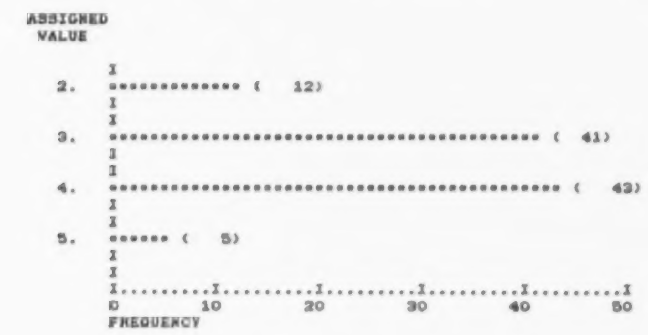
SCALED MEAN SCORES ARE PRESENTED

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTATIVE RIGHTS.

Table 10

Four Year Schools

MANAGEMENT RIGHTS



MEAN = 3.406

n = 101

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

In many cases in the four-year sector, the agent proved to be a significant explanatory variable, and the management rights issue was no exception.[3] Average scores ranged from a low of 3.0 for mergers to 4.2 for independent unions. Of the national unions, the AAUP held management to the lowest score, 3.2.[4]

Region had a significant main effect on management rights language ($p \leq .04$) in the private four-year sector which is concentrated in the East. Other trends were observed: Management rights language was strongest in the West, in smaller schools with enrollments under 750, in schools with bargaining units of less than 50 persons, in bargaining relationships of less than four years duration and in schools with a low ranking on the salary scale. In the private sector, rights scores were higher when the department chairperson was not in the unit.

THE EXTENT OF ASSOCIATION INFLUENCE: THE ADMINISTRATIVE DECISIONS

A. Long-Range Planning

One might assume that given their tradition of collegiality that the four-year schools would have a greater contractual voice in long-range planning than the two year. However, this was not the case. The four-year schools had an average score of 2.18, compared with 2.20 for the two year. This was the only area in which the differences between the two sectors were not statistically significant.

However, some interesting patterns did emerge. Among the regions, the West had the lowest average score, 2.07, and among the states, California had the lowest score, 1.86. Only 12 schools had a score as high as "4", and none had a "5". (See Table 11). Nine of the 12 were AAUP schools, and this union also had the highest average score among the agents, 2.5. Voice in long-range planning also appeared to be a goal that was apt to be realized as the age of a relationship increased.

B. Retrenchment

The two-year data revealed that this administrative issue attracted considerable faculty interest, producing that sector's highest average score, 2.62. In the four-year sector, retrenchment scored highest in the public sector, 3.06, and second highest, 2.88 in the private. The four-year mean was 2.97. (See Table 12). The difference between the two sectors was significant at the $p \leq .01$ level.

Two independent variables were significantly related to voice in retrenchment issues. The first was the bargaining agent. The AAUP had the highest score, 3.3, while independent unions scored lowest, 2.0. Voice in this issue also was significantly related to the stability of the relationship with the agent. Faculties that replaced one national agent with another had the very high mean score of 3.8.

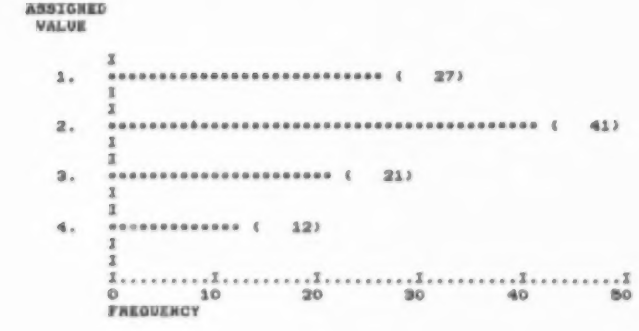
THE PERSONNEL DECISIONS: APPOINTMENT, PROMOTION, NONRENEWAL AND TENURE IN FOUR-YEAR AGREEMENTS

Not unexpectedly, all of the scores for the four-year sector were significantly higher than those for the two-year, ($p \leq .001$).[5] Fewer four-year agreements were silent on these matters. Still, one-fifth had no language concerning appointment and tenure and one-eighth said

Table 11

Four Year Schpols

LONG RANGE PLAN



MEAN = 2.178

n = 101

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 12

Four Year Schools

RETRENCHMENT

MEAN = 2.970

n = 101

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

nothing about promotion and nonrenewal. Strong language was more common than in the two-year sector. One-third scored 4 or 5 on promotion and tenure and one-fifth on appointment and nonrenewal. (See Tables 13, 14, 15 and 16).

In contrast to the two-year schools, the four-year revealed fewer significant relationships with our independent variables. (See Table 17). Table 17 reveals that the agent was the dominant explanatory variable. Stability of the bargaining relationship and institutional status also were important determinants.

Among the national agents, the AAUP took the lead, scoring highest in appointment, 2.6, and tenure, 3.2, in the private sector, and highest in the public in appointment, 2.5, nonrenewal, 2.7, and tenure, 3.2. The NEA had the highest private sector scores on promotion, 3.4, and nonrenewal, 2.9. In the public sector, it ranked first on promotion, 3.3. The independent unions consistently earned the lowest scores.

Ten percent of our four-year faculties had exchanged one national agent for another. These schools consistently had significantly higher scores than those in which the faculty remained with a single agent. It is not surprising that institutional status was positively related to strength of voice in the four personnel areas. Faculties in prestigious research-doctoral schools only had to contend with the task of placing well-established practices in the agreement.

With regard to the differences between the public and private sectors, scores for the private schools were higher in all cases, with the greatest but not statistically significant differences in the two most difficult areas to penetrate, appointment, 2.60 vs. 2.28, and nonrenewal, 2.74 vs. 2.49.

Region, which was an important determining variable in the two-year sector, did not play the same role in the four-year. It was significantly related only to voice in the appointment decision in the private sector. Impressive gains by eastern schools seemed to account for this result.

ANALYSIS

A. The Bargaining Agent

One of the most interesting findings of this research is the apparent significance of the bargaining agent as a determinant of faculty voice. In the two-year sector, the AFT attained the highest overall rating, while for the four-year schools, the AAUP was ahead of the other two national unions. With regard to management rights clauses, in both sectors the agents that had won the greatest faculty voice were also the ones that were most successful in holding down the assertion of management rights.

Do these results indicate that among the national unions, the AAUP is the best negotiator in the four-year sector and the AFT in the two-year?

As we probe further, we encounter the problem of intervening variables. For instance, in the case of the AAUP in the four-year sector, this association operates mainly in the East, a highly organized, pro-union region. The faculties it represents are concentrated in the larger, higher quality, multi-campus schools in which faculty traditionally have been better paid and have had a voice in governance. Partly as a result of this latter factor, the distinction between the "turfs" of faculty

Table 13

Four Year Schools

APPOINTMENT

MEAN = 2.436

n = 101

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 14

Four Year Schools

PROMOTION

MEAN = 2.970

n = 101

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 15

Four Year Schools

NONRENEWAL

MEAN = 2.614

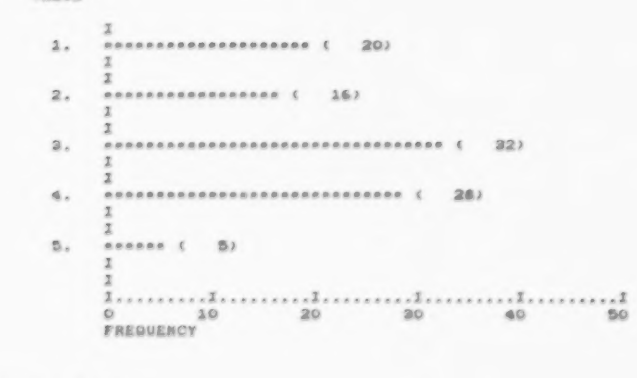
N = 101

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 16

Four Year Schools

TENURE



MEAN = 2.822

N = 101

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table 17

Statistically Significant Relationships
between Dependent and Independent
Variables in the Four-Year Schools

Dependent Variables	Independent Variables
Long Range Planning	None
Retrenchment	$p \leq .01$ with agent $p \leq .02$ with agent stability
Appointments	$p \leq .03$ with agent $p \leq .02$ with dept. Chr. In/Out
Promotion	$p \leq .04$ with agent $p \leq .04$ with state $p \leq .02$ with institutional type
Nonrenewal	$p \leq .04$ with age of relationship $p \leq .01$ with contract number $p \leq .05$ with enabling legislation
Tenure	$p \leq .02$ with agent $p \leq .02$ agent stability $p \leq .02$ with institutional type $p \leq .01$ with salary ranking
Management Rights	$p \leq .004$ with agent

Table 18

Rank of Agent on Dependent Variables
Four-Year Institutions

	MEAN	LRP	RET	APP	PROM	NONR	TEN
Merger (4)	3.00	1.50	3.25	3.25	3.25	3.25	3.50
AAUP (35)	2.91	2.49	3.31	2.63	3.03	2.77	3.20
NEA (24)	2.63	2.08	3.0	2.20	3.29	2.67	2.54
AFT (29)	2.60	2.07	2.79	2.55	2.90	2.48	2.79
Ind. (9)	1.89	1.88	2.0	1.56	2.0	2.0	1.89
Mean		2.18	2.97	2.4	2.97	2.61	2.82

Rank of Agent on Management Rights

Merger	3.00
AAUP	3.20
NEA	3.33
AFT	3.52
IND	4.22
Mean	3.41

and administration has never been clear-cut. This, in turn, leads to the more frequent inclusion of the department chairperson in the bargaining unit, a situation which generally weakens the position of the administration by interfering with a key link to the faculty.

By way of contrast, the NEA which ranked second in the four-year sector, works in a less favorable environment in the Midwest and West which have fewer unions and are less favorable toward them. Its schools are smaller, faculty salaries historically have been lower and the position of the administration stronger.

The AFT which ranked third in the four-year sector shares the AAUP's geographic turf. It is often perceived as a "no nonsense, bread and butter" union. It works with a different group of faculties within the common turf, namely, newer relationships in smaller comprehensive universities.

The "low achieving" independents also clearly operate in a different milieu. Eighty percent are in one campus comprehensive universities with less than 5000 students. In these relationships, the administration benefits from the fact that the chairperson remains outside the bargaining unit.

Turning briefly to the two-year sector, the above-described approach of the AFT appears to function well in this environment. However, it also seems to benefit from some of the same regional and structural factors that favored the AAUP in the four-year sector. The NEA which is the lead union with 60 percent of the organized schools is concentrated in a less supportive environment, similar to the one it faces in the four-year sector.

To use business terminology, each of these faculty unions is operating in a different market. The faculties that are courted by and that select a particular agent are different. Faculty selections may well be based on faculty self-perceptions and the agent, in turn, may well decide to seek the kinds of situations in which it already has developed recognition and acceptance.

Our research uncovered another interesting dynamic concerning the bargaining agent. When faculties replace one national agent with another, contractual gains result. One can speculate that the gains occur because the shift is accompanied by rising expectations and pressures to perform.

B. Public vs. Private Sector

Our data do not permit firm conclusions about differences in the two sectors. Seventy-eight percent of our public schools are in the two-year sector, which is composed almost totally of public institutions, while 90 percent of the private schools are four-year institutions.[6]

The only real test of public-private differences occurred in the four-year sector in which the private consistently outperformed the public, but not at a statistically significant level. Both union and management had higher scores.

There is no question that bargainers in the public sector are more politically and legally circumscribed. The administrator in the private sector is free to enter into a variety of joint decision-making arrangements that may be proscribed in the public sector. Faced by a less robust bureaucracy, private sector parties are able to cut their own deals and follow their own inclinations, even though these may sometimes

lead to excessive yielding of firmness.

C. Two-Year vs. Four-Year Schools

It is not surprising that the four-year sector outperformed the two-year rather consistently. However, our observations about the initial differences in the two sectors should cause one to use caution in praising one sector at the expense of the other. It is highly likely that the two-year schools will continue to use the four-year as their model, and thus, they will strive to gain the peer review and governance institutions that characterize the four-year schools. In time, the differences between the two sectors should diminish, although the public control of the two-year schools may have a dampening effect.

Achievements in both sectors were governed by some rather basic variables. The agent and stability of relationship with the agent were key determinants in both sectors. Also, in both groups, faculty achievements were greater in larger or more prestigious institutions with more plentiful resources. The two-year schools seemed to be more responsive to their local environment. Region and state emerged as key explanatory variables. This result, in turn, may be a reflection of the concentration of the two-year schools in the public sector.

THE FUTURE

What are the likely future directions of bargaining in higher education? A picture of possible developments results from a study we made of the 16 four-year and 94 two-year schools that signed agreements subsequent to the completion of this research.

The four-year sector seems to have retained many of its previous characteristics. There have been slight shifts in the market share of the agents but nothing of consequence. However, the proportion of public institutions has increased from 50 to 58 percent.

In the two-year sector, there were no real changes in the market share of the various agents. However, the two-year schools experienced a shift toward the West in geographic distribution, a phenomenon, in part, attributable to growth in California. There has been a concomitant decline in the Eastern share of this sector.

These changes may have an impact on the future of collective bargaining. If the four-year sector has a higher proportion of public schools, the more circumscribed public model of collective bargaining may become dominant. The two-year sector's westward shift may also lead to a more conservative approach to bargaining. Both of these developments indicate that in the future there may be less rapid progress in the growth of faculty voice in our key decision areas.

FOOTNOTES

Margaret K. Chandler is a Professor in the Management of Organizations and Corporate Relations Divisions of the Graduate School of Business, Columbia University. Daniel J. Julius is Associate Vice President for Academic Affairs, University of San Francisco. The authors wish to thank Dr. Linda Poulin, Assistant Professor, Pepperdine University, and Mr. Steven Grover of the Graduate School of Business, Columbia University, for their assistance in the data analysis.

[1] Joel M. Douglas with Elizabeth A. Kotch, editors. Directory Faculty Contracts and Bargaining Agents in Institutions of Higher Education (New York: NCSCBHEP, Baruch College, City University of New York, 1985) pp. 95-96.

[2] Table A in Appendix 2 sets forth all of the statistically significant differences between the two sectors' ratings on the issues.

[3] See Table 17.

[4] See Table 18.

[5] See Appendix 2, Table A.

[6] See Appendix 2, Table B.

Academic Collective Bargaining

Explanation of Independent and Dependent Variables

Independent Variables	Assigned Values and Codes
1. Region	Midwest = 1 West = 2 East = 3
2. State	Other = 1 Wisconsin = 1 Illinois = 3 Pennsylvania = 4 Washington = 5 New Jersey = 6 Michigan = 7 California = 8 New York = 9
3. Agent	Merger = 1 Independent = 2 NEA = 3 AAUP = 4 AFT = 5
4. Enrollment	0 - 749 = 1 750 - 1499 = 2 1500 - 2999 = 3 3000 - 4999 = 4 5000 - 9999 = 5 10,000 - 19,999 = 6 20,000 - 39,999 = 7 40,000 - above = 8
5. Affiliation	Private = 1 Public = 2
6. Institutional Quality-	I = 1 IIA = 2 IIB = 3 III = 4 IV = 5

7.	Institutional Type	Research A = 1 Research B = 2 Doctoral A = 3 Doctoral B = 4 Comprehensive A = 5 Comprehensive B = 6 Liberal Arts A = 7 Liberal Arts B = 8 Specialized = 9
8.	Enabling Legislation	None = 1 Two-year = 2 Two-year and Four-year = 3 Not applicable = 0
9.	Bargaining Unit Size	0 - 49 = 1 50 - 99 = 2 100 - 149 = 3 150 - 249 = 4 250 - 499 = 5 500 - 999 = 6 1000 and above = 7
10.	Agent Stability	one agent only = 1 Shift from "outside" to "independent" = 2 Shift from "independent" to "outside" agent = 3 Shift from one outside agent to another = 4
11.	Age Relationship	Two-years = 1 Four-years = 2 Six-years = 3 Eight-years = 4 Eleven-years = 5 Fourteen-years = 6 Seventeen-years and above = 7
12.	Contract Number	First contract = 1 Second contract = 2
13.	Department Chair	Out of Unit = 1 In the Unit = 2

14. Institutional Ranking on Salary

0 - 19% = 1
20 - 39% = 2
40 - 59% = 3
60 - 79% = 4
80 - 94% = 5
95% + = 6

Dependent Variables	Scores
Long Range Planning	1 through 5
Retrenchment	" " "
Appointment	" " "
Promotion	" " "
Nonrenewal	" " "
Tenure	" " "
Management Rights	" " "

Table A

STATISTICALLY SIGNIFICANT DIFFERENCES

IN CONTRACTS FOR TWO AND FOUR YEAR SCHOOLS

CONTRACT CLAUSE	TWO-YEAR N = 184 $\bar{x}$ (sd)	FOUR-YEAR N = 101 $\bar{x}$ (sd)	OVERALL N = 285 $\mathcal{M}$ (σ)
APPOINTMENT	1.92 (.90)	2.44 (1.01)**	2.10 (1.00)
PROMOTION	2.19 (1.02)	2.97 (1.09)**	2.47 (1.11)
NONRENEWAL	2.13 (1.01)	2.61 (1.00)**	2.30 (1.03)
TENURE	2.01 (1.11)	2.82 (1.19)**	2.30 (1.20)
RETRENCHMENT	2.62 (.97)	2.97 (1.06)*	2.74 (1.02)
MANAGEMENT RIGHTS	3.80 (.67)	3.41 (.76)**	3.66 (.73)

* $p < .01$

** $p < .001$

$\bar{x}$ = MEAN

$\mathcal{M}$ = MEAN FOR TOTAL POPULATION

sd = STANDARD DEVIATION

σ = STANDARD DEVIATION FOR TOTAL POPLUATION

SCALED MEAN SCORES ARE PRESENTED

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

Table B

STATISTICALLY SIGNIFICANT DIFFERENCES

IN CONTRACTS FOR TWO AND FOUR YEAR

PUBLIC AND PRIVATE SCHOOLS

CONTRACT CLAUSE	PUBLIC		PRIVATE	
	TWO-YEAR N = 178 $\bar{x}$ (sd)	FOUR-YEAR N = 51 $\bar{x}$ (sd)	TWO-YEAR N = 6 $\bar{x}$ (sd)	FOUR-YEAR N = 50 $\bar{x}$ (sd)
* RETRENCHMENT	2.59(.95)	3.06(1.03)	3.50(1.05)	2.88(1.10)
** APPOINTMENT	1.92(.90)	2.29(1.15)	2.00(.89)	2.60(1.03)
** MANAGEMENT RIGHTS	3.81(.67)	3.35(.76)	3.50(.84)	3.66(.79)
** NONRENEWAL	2.12(1.01)	2.49(.97)	2.50(.84)	2.76(1.03)
** TENURE	1.98(1.09)	2.78(1.21)	2.67(1.51)	2.86(1.18)

* $p < .01$

** $p < .001$

$\bar{x}$ = MEAN

sd = STANDARD DEVIATION

SCALED MEAN SCORES ARE PRESENTED

"5" EQUALS STRONGEST ASSERTION OF FACULTY RIGHTS EXCEPT FOR MANAGEMENT RIGHTS CLAUSE WHERE "5" EQUALS STRONGEST ASSERTION OF ADMINISTRATIVE RIGHTS.

IX. RETIREMENT ISSUES IN ACADEMIC COLLECTIVE BARGAINING

A. RETIREMENT PLANNING CLIMATE IN THE 1980S

B. LEGAL ISSUES AFFECTING RETIREMENT

C. EARLY RETIREMENT: THE 1983-1984 EXPERIENCES OF THE STATE UNIVERSITY OF NEW YORK

RETIREMENT ISSUES IN ACADEMIC COLLECTIVE BARGAINING
A. RETIREMENT PLANNING CLIMATE IN THE 1980S

David W. Carter
Vice President
TIAA-CREF

INTRODUCTION

The last 10 years have been characterized by an erratic economy, volatile financial markets, social change, and expansive government regulations. These factors have significantly altered the ways we all conduct our business. The economy, since the early 1970's, has been a major catalyst for change. We endured three recessions, the last of which was the most severe since the Great Depression of the 1930's; oil shortages; double-digit inflation; high unemployment; and so on.

Traditional investment strategies during this time often proved inadequate. Rewards for risk were at times inverted; that is, the interest rates on short-term investments were higher than the rates on long-term investments; money market funds which historically have provided a low real rate of return, outperformed stocks and bonds. And though stocks have made substantial gains more recently, interest rates at the same time have continued providing returns of two to three times the rate of inflation. Insurance companies and money managers have had to alter long-standing investment practices in order to stay alive while some banking institutions, especially in Ohio and California, have expired along the way.

Along with this upheaval in the economy there have been social and demographic changes. The composition of the workforce has changed employment patterns, and thus employee demands for benefits have substantially changed. For example, large numbers of women are now working, more employees are single, and the younger generation tends to change jobs more often than did their parents. These developments swelled the number of people competing for jobs. During the 1970's, enough new jobs were created in the U. S. so that the entire working population of Canada could have migrated south and obtained employment.

THE LEGISLATIVE PENSION ENVIRONMENT

Pension plans are particularly affected by all these changes — probably because of a concern over whether the combination of the traditional sources of retirement income — Social Security, personal

savings, and employer sponsored pension plans — will provide an adequate retirement income. Employer pension plans need to be stronger than ever since Social Security is likely to comprise a less substantial portion of retirement income. The history of Social Security has been one of increases and expansions, which has led to the precarious financial position of the Social Security Trust Fund. An aging population that contains more retirees, and fewer younger workers paying to support them will exacerbate that financial condition. It may, therefore, be unrealistic to count on Social Security to continue to provide the same percentage of retirement income that it has in the past, or, to continue to be indexed to inflation.

As I mentioned earlier, the government has played a large part in changing the pension environment. Since the enactment of ERISA (Employee Retirement Income Security Act), a succession of "employee benefit anagrams" has been enacted. To name a few — there was ADEA (Age Discrimination and Employment Act), ERTA (Economic Recovery Tax Act), TEFRA (Tax Equity and Fiscal Responsibility Act) and last year, DEFRA (Deficit Reduction Act) and REACT (Retirement Equity Act). Each of these acts grew out of a response to economic or social concerns, and has hit employee benefit plans in a number of ways. At least two of them presently pose concern for those of us involved in pension planning.

A. Age Discrimination in Employment Act

First, the Age Discrimination in Employment Act, ADEA, was designed to protect the jobs of older workers, and its amendments raised the mandatory retirement age to 70. ADEA introduced new considerations for personnel staffing needs and the importance of pension plan adequacy. Surprisingly, six years after the ADEA amendments, retirement patterns have not changed. A number of TIAA-CREF participants, particularly administrators, but faculty also have continued to retire early, between ages 55 and 60, and almost all policyholders do so by 65 or 66. But people approaching retirement now are much less influenced by ADEA; they have been making their retirement plans for some time.

Two developments looming over the horizon may contribute to changing this trend. First, there is a movement in Congress to eliminate the mandatory retirement age altogether. This has already happened in 21 states (except for tenured faculty in some instances). And the Equal Employment Opportunity Commission's proposed interpretation of ADEA would prohibit employers from ceasing retirement plan contributions at "normal retirement age" for those who continue working. Eliminating the mandatory retirement age would make continued employment possible, and the EEOC's proposal would provide the extra financial incentive for staff members to stay on.

So, the future may see different retirement patterns. To maintain a vital workforce, means will have to be devised to select between those older workers who continue to be effective and those who do not. Many colleges and universities may have to deal with the inadequately performing staff member who is also immovable. Thus, we are faced with the question of whether or not educational institutions should be offering early retirement incentive plans to people 65, 68 and 70 years old. On the other hand, strategies will also have to be developed to accommodate and best use those older workers who continue to offer the intellectual and physical capability to enhance the academic environment.

B. Retirement Equity Act

The second piece of legislation, the Retirement Equity Act, or REACT, is affecting the early end of the career. REACT decreases the ages at which pension plan participation must be made available to employees in plans subject to ERISA, that is, other than public plans. The new rules are age 21 and three years of service; or age 26 and one year of service, for teaching institutions. The combination of continued contributions after normal retirement age and earlier participation could significantly lengthen accumulation periods.

Some colleges and universities may be tempted to mitigate the financial burden this extended accumulation period imposes by making participation in the retirement plan voluntary, or by lowering the retirement plan contribution rate for all participants. We recommend against these moves. We believe they are short-sighted solutions that may make conditions worse in the long run. The best way to maintain sufficient turnover in personnel and to assure that employees retire when it is mutually beneficial is to make certain they are financially able to do so at normal retirement age, or even before. "Til death do us part" should not apply to the employer-employee relationship.

Although I have been talking about the past and the present, there is little evidence to indicate that pension planning in the future will be conducted in a climate that is any more stable. Here are some things to keep in mind as your plans are reviewed.

PENSION PLANNING POLICY ISSUES

The federal government will continue to intervene in the pension arena. In 1985, we may see another tax act, and there are currently three broad tax reform plans circulating in Washington. All of them call for a reduction of so-called tax-favored items. Retirement plan contributions and earnings would still receive tax-deferred treatment. But extra tax-deferred savings would be affected. At least one proposal makes clear that the tax advantages allowed are to be for retirement savings, not for funds that can be withdrawn for other purposes. Premature distributions — cashouts — would be restricted and, when allowed, would be subject to a heavy additional tax penalty. This may make tax-deferred savings less attractive, increasing the burden on employer pension plans. The tax proposals also reveal a concern for equity between individuals who have employer-sponsored, tax-favored retirement savings plans available to them and those who do not. This is evidenced by a proposal to increase the limit on deductible IRA contributions, and eliminate, or significantly modify employer-sponsored 401(k) savings plans. TIAA-CREF will be monitoring these developments, and we will continue to provide you with information to deal with them and any others that come to pass in the future.

These types of policy issues will be consuming an increasing portion of your and our time in the months and years ahead. With an eye to establishing priorities, a special committee of TIAA's and CREF's trustees has just completed objectives for TIAA-CREF for the remainder of the decade, including study of purposes and types of pension plans, product lines, the role of participating institutions, communications with policyholders, and the structure of the organization. At the last joint board meeting in February, the TIAA and CREF Boards of Trustees unanimously approved the report. All college and university presidents and business officers received copies of the report last month.

This Committee's report provides us with direction for the future to better enable TIAA-CREF to pursue its goal of providing employees and employers in the educational community with a retirement system that meets their collective needs. The committee affirmed that the system should continue to offer portable, fully funded, immediately vested pensions that provide participants with a lifetime retirement income. The committee also affirmed TIAA-CREF's defined contribution approach, which provides the portability of benefits that is crucial to a career in higher education and avoids the risk of institutions building up unfunded pension liabilities. The committee affirmed that the primary mission of TIAA-CREF should be to continue to serve its historic pension goals.

The committee's review of the investment policies and performance of TIAA and CREF concluded that TIAA and CREF are well structured to meet the challenges of the uncertain investment climate we've discussed, and to provide a balanced and diversified investment base for retirement income.

While affirming TIAA-CREF's basic design and essential purpose, the trustee committee also explored ways to provide additional personal investment choice consistent with the objectives of a pension plan. They approved future plans to introduce a CREF Money Market Annuity. The Money Market Annuity will take the form of a market-to-market variable annuity investing in short-term debt instruments.

The committee also recommended establishing a CREF bond fund as an asset-value accumulation vehicle. The addition of these two funds to the existing CREF equity fund would enable participants to allocate premiums among three CREF funds and TIAA. Accumulated funds could be transferred freely among the CREF funds and from any of these funds to TIAA.

TIAA-CREF takes the position that a well-designed pension plan should provide benefits to participants only in the form of lifetime retirement income — an income that participants cannot outlive. This is not an unusual position, as a recent survey we conducted of the corporate pension plans of the Fortune 500 companies indicates. The great majority of the respondents do not permit cash at retirement, nor do they permit vested salaried employees to elect cash upon termination of employment before retirement. And most of those that allow cash require the individual to obtain committee approval for such a distribution.

There are, however, a few colleges and universities that believe cash under a pension plan should be available. For those that feel that way, TIAA-CREF offers a Group Retirement Annuity, which makes cash from future service contributions available to participants at retirement or termination of employment. The TIAA-CREF Group Retirement Annuity has the same immediate vesting and life annuity features as do TIAA-CREF individual annuities. But, it also gives participants the option, subject to institution specifications, to withdraw or transfer part or all of their accumulations as a single sum within 60 days of the date of retirement or earlier termination of employment.

A LOOK AHEAD IN PENSION PLANNING

Given all of these happenings and options, what should bargaining groups do or not do as they look at their employers' pension plans? I've mentioned some but I'd like to conclude with some points to think about:

1. We cannot place a lot of confidence in economic predictions for the future. Inflation is down at this time but no one predicted the upheavals

of the past, and no one can say for sure what the future holds.

2. The Federal government will continue to intervene in the pension arena. The need to cut the federal deficit, Social Security's problems, concerns for worker security, and the greying of America virtually assure continued federal action.

3. We will need to adjust to a diverse workforce. Colleges will have to consider affordable innovations that will help faculty and staff tailor benefits to individual needs. For example, the youngest and oldest workers may have little concern for life insurance benefits, while middle age workers may have a strong need for them. Married workers will be interested in dependent care benefits; single workers may want tax-deferred savings instead. Adapting benefits to individual needs will become a pressing necessity if employee benefits become taxable, for no employee will be willing to pay taxes on unwanted benefits.

4. Since the federal government is cutting back on the extent to which it will pay for the medical care of older workers and their spouses, employers will increasingly be required to provide this protection. And long-term care of the aged is already a growth industry and a growing problem for America since older workers incur more health expenses than younger workers. But diversity presents opportunities for innovation, as well. For example, the University of California Hastings College of Law has taken some initiative in hiring older workers. It recruited some of the most esteemed law professors retired for age from other law schools, and students flock to their courses. Colleges may have a growth opportunity in training second career faculty, and may see pressure to hire them.

5. Early retirement incentives should be carefully considered. While they are good for certain situations, they can also prove to be very expensive as Du Pont learned just a few weeks ago. Their early retirement program was unexpectedly popular resulting in a large reduction in Du Pont's first quarter earnings. While the company estimated that 6,500 employees would take advantage of early retirement, 11,500 applied.

6. Counseling will become even more important, both for institutions and staff members. Individuals with increased investment choice will demand information in order to make the right decisions. This will mean increased responsibility for plan administrators. Pre-retirement sessions will be very important to help prepare people for retirement, and for helping them choose when they should retire. We will, of course, continue to provide colleges and their staff members with information related to the TIAA-CREF system, and believe it or not, the information flow will increase.

A final thought: none of us should lose sight of the nature of the pension plan commitment. Participants may have a relationship with the TIAA-CREF pension plan for 40, 50, 60, or more years, through both the accumulation and annuity stages. The retirement income promise must be there, far into the future, not only to provide academic employees with an adequate pension income, but also to make the transition from active service to retirement one that is orderly, financially feasible, and to the benefit of both the institution and the retiring staff member. Imagination and adaptation will always play a part in providing adequate retirement income to a diverse constituency. But changes to a successful system cannot be implemented without careful examination. TIAA-CREF will continue to work to provide colleges and universities with a pension plan that will enable their staff members to realize their best expectations for retirement.

RETIREMENT ISSUES IN ACADEMIC COLLECTIVE BARGAINING
B. LEGAL ISSUES AFFECTING RETIREMENT

Ann H. Franke
Associate Secretary and
Associate Counsel, AAUP

INTRODUCTION

This morning I plan to outline some current issues in the retirement area. These include mandatory retirement, employer pension contributions, state legislative activity, sex discrimination litigation and some litigation involving elements of TIAA/CREF. I will focus on areas of AAUP initiative, as well as those that have generated questions that have crossed my desk. We can define these current issues in terms of two questions. First, who retires when, and second, what their level of benefit is going to be.

Retirement issues tend to become quite technical, therefore, it is important that bargaining agents do two things. The first is to have access to good information on retirement issues at the institution and the state. The second is to have the expertise to analyze the information that comes their way. Bargaining agents can function effectively to educate unit members, negotiate retirement issues, litigate, and also to lobby. Additional complexities arise from the different levels of government regulation. This paper links retirement issues with various federal, state and institutional plans.

UNCAPPING MANDATORY RETIREMENT

Beginning at the federal level, let me outline some activity on the subject of mandatory retirement. As you may know, the Age Discrimination in Employment Act allows employers mandatorily to retire employees when they reach the age of seventy. There are some exceptions allowing retirement at a lower age for certain policy-making employees. But as a general matter, age seventy is the mandatory retirement age. There is a bill pending in the House, introduced by Claude Pepper, to uncap mandatory retirement. This would effectively eliminate age seventy as the mandatory retirement age, and allow employees to work as long as they are able.

The AAUP, and particularly our Committee A on Academic Freedom and Tenure, has addressed the subject of uncapping mandatory retirement from the perspective of its impact on the tenure system. The thrust of our thinking to date has been that it is very useful to have a set of settled expectations that professors with tenure will retire as of some

particular age. Uncapping mandatory retirement raises the problem of assessing the older professors and deciding which ones are functioning pretty well and making judgments within that group. This raises the possibility of undermining the concept of tenure in some respects.

Another aspect of uncapping mandatory retirement that is often cited is its impact on affirmative action, on hiring at the lower end of the workforce. When you allow people to work longer and longer into their lives, then the opportunities for new hiring become limited. This has been cited as an obstacle to the hiring of minorities and women, and to the infusion of younger people into the professoriate. However, I would note that just two weeks ago the Association's Committee W on the Status of Women in the Profession raised some questions about this. They looked to the proliferation of part-time positions and non-tenure track appointments which have been called folding chair appointments. One thought that the committee voiced, was that mandatory retirement may simply preserve opportunities for institutions to enlarge the underclass of the profession. Some question whether the administrators urging the retention of mandatory retirement on grounds of affirmative action are truly committed to taking affirmative action. So, the affirmative action implications, I think, are being debated on both sides.

As you may have seen in the Chronicle earlier this month, the American Council on Education has come out favoring a fifteen-year exemption to the Pepper legislation for colleges and universities. I think the theory behind this is that, yes, there are implications for the tenure system and we should phase uncapping into higher education.

What has the AFL-CIO been doing on this issue? As I understand it, they have a policy that favors the retention of the mandatory retirement age, however, there is debate within that organization. They are not taking an active position on the current legislation.

What will the future bring? There are two theories. I have heard that the smart money says the legislation is not going to go anywhere in the very near future because unemployment is so high. We have to make some inroads on solving that problem before we can eliminate a mandatory retirement age. On the other hand though, I think there are pressures on the Social Security System and on other pension systems. As the demographic bulge in the population advances in age, there will be pressure to keep older people working and contributing into the pension system. So I think these are the kinds of things that will be balanced. I look for legislative activity, and perhaps, some hearings.

AGE DISCRIMINATION

Another federal issue in the area of retirement is the question of ultimate benefits at retirement. This question arises out of age discrimination considerations. The issue is employer contributions for employees who work between the normal retirement age and the mandatory retirement age. This is the largest single retirement issue that crosses my desk. The issue is the following. Institutions generally define a normal retirement age of sixty-five, with mandatory retirement at seventy. There is a five-year period in between and there are certain things that an employer can and cannot do to employees within that period. Under recent interpretations of the law, one thing that an employer could do was to stop making the pension contribution during that five-year interval.

Apparently some thirty percent of the institutions that participate in TIAA/CREF discontinue the employer pension contribution after a person works beyond the normal retirement age. I think that every

faculty member who reaches sixty-five at these institutions ends up calling or writing me when they find out that the employer pension contribution is going to cease. They seek guidance as to whether this is legal or whether it's age discrimination. They're personally very upset about it. It's not mandatory that an institution cease the pension contribution during this period. Even as regulatory activity goes on at the EEOC, I know that some institutions are moving to change their policies in this area. It's not really that expensive to continue making these pension contributions and, it does substantially aid the individual who chooses to work beyond the normal retirement age. The subject could be a negotiable one if you are at an institution where these pension contributions are discontinued.

The history of this arrangement is one that I find quite interesting as a case study in federal administrative rule-making. The original agency that had enforcement authority for the Age Discrimination in Employment Act was the Department of Labor. The Labor Department promulgated an interpretation of the Age Discrimination Act saying that it's all right for an employer to cease pension contributions during this interval between normal retirement and mandatory retirement. Everybody understood the arrangements, although whether they comported with the spirit of the Age Discrimination Act is subject to debate.

In 1979, the EEOC took over enforcement authority for the Age Discrimination Act. They announced to the world that they were going to study the previous interpretations of the Act that the Labor Department had promulgated. Well, they studied, and they studied. Years rolled by. It wasn't clear exactly what they were doing. They had some comprehensive staff reports. Meanwhile, Claude Pepper over in Congress was commissioning studies that were saying it was really unfair to older workers to discontinue pension contributions. To some degree, the EEOC was stuck in molasses.

They continued to study the question and in June of 1984, they finally addressed the issue. What happened then was that the EEOC voted to rescind the earlier Department of Labor interpretation. They simply voted to wipe it off the books. They did not, however, develop any substitute interpretation. All they said was that the Department of Labor was wrong.

Now the political process began heating up. There were some new Heritage Foundation people who were in high positions at the EEOC who probably were coming under pressure for this pro-civil rights stance, as it might have been seen. Meanwhile, some on the Hill were, at the request of older Americans, pushing the EEOC to continue its initiative in this area. Finally, just last month, the Commission did come out with a series of substitute interpretations that say, in many circumstances, employers will be required to continue the pension contributions in between the normal retirement age and the mandatory retirement age.

However, the story is not yet over. These regulations are merely proposed for the purposes of interagency coordination. And so now, the Treasury Department, the Labor Department, and the Office of Management and Budget will all have a crack at the issue. It's anybody's guess what will finally result from this rule-making process. But I do think that probably the EEOC will come out with some regulations that go part-way to assuring the continuation of pension contributions during this interval.

STATE MANDATORY RETIREMENT LAWS

Mandatory retirement activity is not confined to the federal level. There are many states that are taking a look at this issue. Nineteen states have uncapped mandatory retirement. This can be done through an amendment to a state age discrimination or state civil rights statute. There may also be special arrangements for higher education. I think it's important for you to know whether there are initiatives on the subject of mandatory retirement in your state legislature.

Another thing that state legislatures are doing is taking a look at state employee retirement systems. Many public colleges and universities participate in these state retirement systems, thus, any change is significant for higher education. There have been interesting cases arising in Pennsylvania and Maryland in which state legislatures have acted supposedly to insure the actuarial soundness of the state retirement systems. In Pennsylvania, the state increased the employee contribution from five percent to six-and-a-quarter percent. In Maryland, the legislature reassessed the cost-of-living increases which were unlimited in the state pension plan. They felt that this impaired the actuarial soundness and made it impossible for them to plan funding. They consequently capped the cost-of-living adjustments at three percent in the course of making some other changes in the retirement plan for state employees.

Both of these changes obviously worked to the disadvantage of those who are currently participating in the plan. In both states, bargaining agents filed suit against the state government alleging that the legislation was unconstitutional. Article I, Section 10 of the Federal Constitution says, "No state shall impair the obligation of contracts." Such contract clauses are also contained in many state constitutions. This has been something of a sleeper of a Constitutional provision that the Supreme Court breathed new life into in the late 1970s. What we see in this retirement litigation is another use of the contracts clause.

We have two cases with rather similar facts, both relying on impairment of contracts theories. The argument is essentially that employees had contractual rights in the state retirement system as it had been devised. The new legislation impaired the individual contract rights of the participants in the plan. In Pennsylvania, APSCUF and some other bargaining agents, challenged the legislation and succeeded in a decision last year. The Pennsylvania Supreme Court said, "Yes, this did impair contracts for those who were currently vested in the pension plan." The court questioned whether the state had made an actuarial showing that this would be necessary to insure the soundness of the plan. The contracts clause in the state constitution was read to prevent this kind of subsequent legislative change. In Maryland, however, with similar facts and the same theory, an opposite decision was reached. There, a federal district judge gave much more deference to the legislature and was convinced that the move was reasonable from a public policy standpoint to insure the actuarial soundness of the plan. That case is currently on appeal.

In sum, on this issue, when legislatures do things to water down existing benefits or change the rules for current plan participants, they can expect challenges from those who represent these participants.

SEX DISCRIMINATION

Let me now move to some developments that may arise at the level of the plan itself and the sex discrimination litigation that has been filed against TIAA/CREF.

The first is a case rather renown in higher education circles, Spirt vs. Long Island University and TIAA/CREF. Here, Diana Spirt, who is a tenured faculty member at Long Island University, sued under Title VII of the Civil Rights Act challenging the use of sex-based actuarial tables by her employer, Long Island University, and the pension plan, TIAA/CREF. The EEOC and the AAUP intervened in the litigation, which I'm delighted to report was successfully resolved in December of last year. Essentially, the decree of the district court provides that those who retire on, or after, May 1, 1980, will have all their benefits computed on a sex neutral basis.

Let me just take a moment to offer what I find to be the most convincing piece of evidence in support of the concept of sex neutral actuarial tables. Those of you who are older than I will remember the days of race-based actuarial tables. Those have gone by the boards, and I think sex-based actuarial tables are also on their way out for good.

If you take a thousand babies, five hundred girls and five hundred boys, born in a month and track their mortality experience, here is what you'll find. A few of the boys will die at a relatively young age—the heart attack at forty-nine, that sort of thing. A few of the girls will live to be quite old. But the mortality for eighty percent of those people will be paired. The use of sex-based actuarial tables had put the burden of supporting those few women who live longer, only on all women and given the benefit of the early mortality of those few men, only on all men. Because the mortality experience is more paired than separate, as a societal matter it makes sense to share the risk. That, indeed, is the approach that Congress took in Title VII.

The EEOC took another look at sex-based actuarial tables and is trying to seek relief for those who retired before May 1980. In December, they filed a new suit against TIAA seeking relief for the earlier class of retirees as well.

CONCLUSION

Let me move down to the level of the institution and mention one very creative piece of litigation that was filed in New Jersey back in 1975 and only recently resolved. There are AAUP bargaining agents at Rutgers and at the University of Medicine and Dentistry of New Jersey. They discovered that the state was very slow in making payments to TIAA/CREF on the accounts of the faculty and administrators who participated. The lateness of these payments resulted in a loss of interest on the employees' accounts. A class action lawsuit was filed back in 1975 on behalf of three thousand faculty as well as administrators. (Here we have a bargaining agent going to bat for administrators.) Long district court proceedings ensued. Ultimately, in 1983, a successful resolution was reached with the state paying over $250,000 to make whole the accounts of the participants that suffered the loss of earnings because the state was slow in making payment.

Also, coincidentally, around the same time some four hundred other institutions that had been laggard in this respect contributed a total of $1,000,000 to TIAA/CREF to make up for late payments. Now the blue and yellow slips that TIAA/CREF participants receive have on the back a schedule of when payments were made on behalf of the individual employee. One can now see whether payments were forwarded in a timely fashion by his employer. I think this is a good example of a bargaining agent identifying a problem, having access to information, having the expertise to determine that there was a problem, and then taking aggressive action to correct it.

In sum, I urge two things—the gathering of information and putting it in the hands of groups of individuals both on the bargaining agent's side and on the employer's side who have the expertise to assess what's going on in the retirement area.

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RETIREMENT ISSUES IN ACADEMIC COLLECTIVE BARGAINING
C. EARLY RETIREMENT: THE 1983-1984 EXPERIENCES OF THE STATE UNIVERSITY OF NEW YORK

Thomas M. Mannix
Associate Vice Chancellor-Employee Relations, SUNY
and
Nick J. Paradiso, Jr.
Assistant Vice Chancellor-Personnel, SUNY

INTRODUCTION

Early retirement programs primarily aimed at higher education faculty and academic support personnel have been growing in popularity over the past decade. About ten years ago, a TIAA/CREF questionnaire found that about 20% of the colleges and universities surveyed (250/1,194) either offered an early retirement option, were considering offering such a program, or had an active study of such a program under way.[1] Another 1974 survey found some combination of early retirement plans or reduced teaching loads in place at Cornell, Michigan State, North Carolina, Oregon, Princeton, Stanford, the Universities of Washington, Virginia, and Wisconsin, and Yale.[2] Of the AAU-type institutions surveyed in 1973, fifteen had an early retirement plan using a defined contribution scheme, four used a defined benefit plan,[3] and five had some other early retirement option available to faculty.

THE DRIVE FOR EARLY RETIREMENT

Renewed interest in early retirement has been sparked by several factors including passage of the 1978 amendment to the Age Discrimination in Employment Act (ADEA) of 1964[4] and the four "toos", "too many professors, too much tenure, too little money,"[5] and too few students. Pressure for advancement opportunities from younger faculty and shifts in student preference, coupled with declines in applications, also contributed.[6]

Colleges and universities whose student population was not in decline became interested in early retirement options especially when students began to move into business-oriented courses at the expense of the liberal arts. The combination of high percentages of tenure, slow or no growth situations, few retirements, and low turnover created pressures[7] on academic management to do something to free up some positions. Early retirement options were seen as one of the remedies[8] for universities that faced a steady-state demographic or fiscal situation.

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With at least 70% to 80% of its expenditures tied up in personnel costs, a college or university is hard pressed to respond to enrollment declines and budget gaps with anything other than staff reductions.[9] A 1974 report of 163 institutions in 14 states found that 74% of the private four-year colleges, 66% of the public four-year colleges, and 41% of the two-year institutions suffered faculty reductions in the three years 1971-72, 1972-73, and 1973-74. Ninety-one of the 163 colleges and universities had full-time employees reduced: 178 employees in 1971-72; 259 employees in 1972-73; and 517 employees in 1973-74.[10]

Faced with decreases in enrollment, increased operating costs, reduced state funding, decreased federal funding, lowered development contributions, declines in foundation grants, or combinations of the above, colleges retrenched. After first leaving vacancies unfilled, terminating non-tenured and part-time faculty, and terminating teaching assistants, some colleges then turned to early retirement plans as a response to hard times.[11]

Ten years later in 1984, a TIAA/CREF official reported about 100 colleges with early retirement plans in operation. No two plans were identical.[12]

Growth in higher education early retirement options is following the general trend in society. According to the New York City-based Conference Board, the early retirement trend is continuing in the private sector of the economy with no end of its growth in sight. The Conference Board recently surveyed 363 corporations and found that the average retirement age in most companies was substantially lower in 1984 than it was twelve years earlier. Only 14% of those retiring in 1984 were 65 years of age or older as compared with 42% of those retiring in 1972. In 1984, 51% of the retiring employees were 62 years of age or younger. This was up from 23% in 1972. Sixty-two percent of the companies surveyed in 1984 had an early retirement feature.[13]

One researcher found that colleges and universities may be reluctant to enter into early retirement options because people assume that an early retiree has some form of stigma or is a quitter. Some people equate retirement with dying or uselessness. Many people have made no plans for retirement and are not ready to face its consequences when retirement comes normally, let alone when early retirement must be considered. Some people can't afford to retire or feel they can't afford to retire. Taking a second career is no option to a person with limited skills or who is afraid of the risks associated with starting something new when one is older. Colleges reluctant to try an early retirement plan may be reacting to this type of thinking. Some believe that early retirement may only be for those who can afford it, the rich.[14]

There is some confusion over precisely what an early retirement option is. The definition of early retirement can take several forms. The "normal" retirement age for college faculty is 65.[15] Early retirement can be defined in relation to the normal retirement age or it could be defined as any retirement that occurs before age 70.[16] The 1980 AAC-AAUP "Statement of Principles on Academic Retirement and Insurance Plans" defines the normal retirement age as that age where the retirement benefit level is sufficient to make retirement economically feasible.[17] An earlier TIAA study of benefit plans in nearly 2,100 four-year colleges found the normal retirement age of 65 in 61.8% of the public colleges and 91.3% of the private colleges. Only 13% of the public colleges had a normal retirement age of 62 years or less.[18] Although early retirement is generally described as prior to a plan's stated normal retirement age,[19] early retirees are usually at least 55 years old, and some are as old as 69 where the mandatory retirement age was 70.[20] For those colleges without

a mandatory retirement age, any retirement could be viewed as early. The general trend of retiring at a younger age, with or without early retirement incentives, has been assisted by the growth of voluntary tapering off plans and phased retirement programs.[21] The recent Conference Board survey mentioned earlier found the proportion of employees who were retiring before age 65, jumped from 62% in 1978 to 80% five years later in 1983.[22]

IN SUPPORT OF EARLY RETIREMENT

Proponents of early retirement plans often argue that:

1. early retirement is desirable for the employee the institution, or both — the win/win situation;

2. early retirement need not result in a significant increase in retirement costs;

3. such options are an answer to the need for more flexibility in meeting long-range planning needs;

4. it allows upgrading of personnel quality;

5. the options create upward mobility opportunities for junior staff; and

6. the oversupply of teachers in the labor market can be eased through vacancies resulting from early retirement programs.[23]

Further, they maintain that an early retirement option could:

1. solve the problems of a long-held position being phased out;

2. assist a faculty member whose weakening health is short of disability, but whose quality and productivity has been impacted;

3. provide a cure for faculty ennui;

4. make it easier to handle cases of premature obsolescence;

5. allow people to phase into retirement gradually; and/or

6. create a new environment on campus or within certain departments or programs.[24]

Early retirement plans are viewed as an academic policy when designed to improve turnover, create positions for reallocation, etc., or a fiscal policy when designed to save money. Some plans feature both academic and fiscal policy considerations. With advanced planning and some luck, a college may be able to study or implement an early retirement option without creating problems between the academic and fiscal policy offices, not to mention problems or concerns among its employees. The demand for faculty positions for women and minorities[25] and the ability to shift resources to new or expanding fields or to a program in need of rebuilding are other examples of academic policy concerns.[26] Reducing payroll costs, increasing budgetary flexibility, and easing budget shortages are the major fiscal policy considerations

mentioned most often.[27]

Early retirement options can have different consequences for each college depending upon salary ranges and practices; the age distribution of the faculty by rank and by discipline; the accumulated years of service of the faculty; the amount of funds in the pension system or plans; among other factors.[28] Colleges planning an early retirement option will want to look carefully at the current ages of its faculty, tenured faculty placements, and turnover rates.[29]

Eligibility for early retirement options are usually established using some combination of age, employee classification, salary classification and length of service.[30] Many plans build in a social security compensator for those participants below the age of 62 or between the ages of 62 and 65.[31] Continuation of some benefits, especially the group health benefits, is an important consideration in most plans.[32] Opportunities for part-time employment as temporary employees[33] or phased retirement approaches are used.[34] To date, phased retirement plans are rare even though the advantages of phased retirement are similar to early retirement plans.[35] The Conference Board report found only 1% of the employers surveyed had a formal phased retirement program while another 2% reported informal phased retirement possibilities.[36]

TYPES OF EARLY RETIREMENT PLANS

At least ten separate approaches to early retirement plans have been identified and defined:

1. full salary annuity;
2. severance payment;
3. individual-based annuity;
4. group-based annuity;
5. partial employment with individual-based annuity;
6. partial employment with group-based annuity;
7. continued payment to employee's annuity;
8. severance pay coupled with continued payment to the employee's annuity;
9. liberalized benefit schedules; and
10. continuation of perquisites.[37]

A college could pick and choose from among these approaches mixing and matching or varying its proposed offering to suit the individual needs of the particular institution. One university targeted faculty fifty-five years of age or older who were earning below the median for each rank.[38] Another developed a different plan because its early retirement option had been designed to help implement an academic policy decision to grow at a slower rate than had been previously planned.[39]

As an early retirement plan is being considered, certain issues should be discussed and questions answered. To what extent should the plan impact on the existing faculty peer review and evaluation procedure? What additional retirement and financial counseling would be needed? How will the early retirement option information be communicated to

eligible employees? Will there be any provisions for emeriti to contribute to the college community? Will existing perquisites with respect to the campus directory, use of the library and photocopy facilities, access to computers and clerical support, office space and parking, faculty club membership and privileges, reduced ticket prices to cultural and athletic events, bookstore discounts, etc., be improved or offered to early retirees?[40] What happens to funds and lines that are freed? Is there a reallocation mechanism? Is legislation required? Is part-time work available? If so, under what circumstances? What will the faculty organization or union think? Is the plan legally feasible?[41] Answers to those questions will put a college well on the way toward a plan.

FEATURES OF EARLY RETIREMENT OPTIONS

Early retirement plans currently in use reflect certain characteristics:

1. sufficient time to make and implement decisions;
2. voluntary participation;
3. broad, open eligibility;
4. contents tailored to meet participants' needs;
5. attention to human elements;
6. reinforcement and follow-up; and
7. sufficient flexibility to be able to respond to changes in the work force composition, retirement rules, and other external developments.[42]

A major aspect of retirement, early or regular, is the need for advance planning. Where to live, what to do with or about real estate, life style adjustments, preparation for health care needs, legal affairs, discussions with spouse or family, relatives, and friends, all take time to sort out. Early retirement options may simply shorten the time to plan and decide.[43] Long-range planning for retirement is rare. Most people who retire start thinking about that prospect seriously about four years before they actually do so.[44] Often, early retirement options include a limited time period for accepting the option. The 'window' is used to stimulate thinking, planning, and decision-making. If the early retirement option is to be a one-time offer with too brief a window period, decisions to take or to refuse the option may be forced prematurely. Opportunities not exercised in such a forced-choice situation are lost.[45]

There appears to be consensus that early retirement options will not create sizeable quantitative changes in the number of available faculty positions.[46] Neither will those options dramatically alter the nature and composition of the faculty. Even though the plans can be designed to save money, large sums may not be recouped. Early retirement options will probably allow a few replacements or reallocations, which given the proper circumstances, could have a major impact on an institution.[47]

A college may wish to target under-enrolled, over-staffed departments or programs. Even with careful planning and execution, the faculty in the target group may not respond.[48] A plan aimed at Professor X may miss him or her and attract Professors Y and Z. Some administrators feel that those faculty who have options, and are interested in pursuing other employment opportunities, are precisely the faculty that the college should retain.[49] Despite that concern, early

retirement plans potentially offer a significant qualitative impact.[50]

The real costs to a college occur when employees critical to its mission take early retirement and there are no ready replacements from the junior staff. Temporary shortages of key personnel are costly in more ways than just dollars.[51] Executives complain that they often lose their best and brightest employees to early retirement options. Those employees know that they can take early retirement and easily land another job, sometimes even a better position.[52] In higher education, that concern may be more accurate with respect to academic support personnel and classified employees.

Ladd and Lipsett, in a 1977 survey, found a strong correlation between vigorous research activity and late retirement.[53] Forty-eight percent of all surveyed and 30% of those between ages 55 and 62 would consider early retirement if part-time employment was available. Two-thirds of all academics would consider early retirement if their pension benfits would be equal to what they would have been at the mandatory retirement age.[54] One-third of the academic work force, therefore, would not consider early retirement under any circumstances even if no loss of income occurred. A 1980 survey of Oregon faculty found results consistent to Ladd and Lipsett. In Oregon, Professors planned to retire later than Associate and Assistant Professors. Dissatisfied faculty desired early retirement but researchers wished to retire late.[55]

LIMITATIONS ON THE GROWTH OF EARLY RETIREMENT

Several factors seem to be inhibiting the growth of early retirement options in higher education:

1. early retirement is often viewed in a negative light, as a euphemism for severance, a dismissal, a disguised lay-off, a weakening of tenure, etc.;

2. the loss of the transfer market in higher education has heightened job security concerns and made the jobs people have more precious;

3. there is concern that faculty lines either will disappear or will be reallocated improperly; and

4. there is often a reluctance to make any decision that might be considered unpleasant.[56]

Some of those factors influence faculty behavior at one campus, administrative behavior at another, and create a joint response at a third. Unions put early retirement demands on the bargaining table where management rejects them or is disinterested. At other campuses, management propose early retirement ideas only to find union opposition.

Even with the growth of early retirement options, few individual faculty members actually use early retirement programs.[57] One mid-western campus reported four people took early retirement in 1984-85 but three of those would have retired anyway. Another college in the same state reported fifteen faculty retired early which is at least double what had been anticipated. A small, private college in New England reported only two faculty took early retirement in 1984-85. Contrast that with the experience reported by the City University of New York. Seven hundred and fifty of 3,200 eligible retired early in 1984-85 but only 18% of those were faculty. CUNY reported support staff and skilled trades employees took the early retirement option in great numbers. Queens

College in CUNY was particularly hard hit with key personnel in general accounting, registrar, admissions, and payroll, nearly one-third of the secretaries, about half of the bursar's office, and most of the personnel and purchasing staffs all opting to leave early.[58]

Early retirement literature does not present a clear picture. Research results generally, or for higher education in particular, are thin. More studies are needed. If a college has designed an early retirement program when it faces problems of poor faculty health or diminished quality work, is that institution being served as well as an improved disability plan or rigorous peer evaluation and retraining might?[59] Early retirement is not a cure-all.[60] It is not an instant solution to current staffing and financial problems.[61] Early retirement plans have not opened significant numbers of faculty positions.[62]

Early retirement can inject a positive thrust into an institution's faculty personnel policies, broaden options, and provide faculty development possibilities.[63] A few, important replacements or reallocations may occur. Early retirement plans are of special relevance to institutions interested in making a few qualitative adjustments.[64]

Early retirement plans are reported not to save large sums of money. Depending upon your definition of what a large sum of money is, that might be true. Utah State University saved $1,076,971 in 1980 when it did not replace 14 of the 48 people who retired early.[65]

Even if early retirement plans do bring limited benefits to employees and employers, they are expected to continue to grow. Two trends, increased incentives to retire early and decreased incentives to remain at work, will be features of most plans.[66]

No one has yet been able to answer the general question, "How do you know of those who retired early, who would have retired then anyway without the early retirement incentive?" The one experience mentioned earlier involved only four people. Better questions to ask may be:

1. Does it matter if people retire early?

2. Should it matter?

Assuming one has a choice, answers to those questions will lead you toward or away from early retirement plans or options.

THE SUNY EARLY RETIREMENT EXPERIENCE

A. The 1983-1984 Early Retirement Option

The State University of New York (SUNY) has now had two separate experiences with early retirement options, one in 1983-84 and another in 1984-85. In 1983, the State of New York faced a massive revenue shortfall. In an effort to avoid large scale layoffs of state employees, the Governor proposed a series of voluntary personnel reductions. An early retirement option was one of the voluntary reduction plans that was developed. The law was amended to allow the New York State Employees' Retirement System to offer an additional three years of service credit to any of its members who decided to retire early. Any member of the New York State Employees' Retirement System who met the minimal retirement eligibility criteria was eligible for early retirement. In planning this early retirement option, the State of New York assumed that some number of positions vacated by the early retirement process would remain unfilled and those unfilled positions would reduce the need to lay off State employees. If all worked according to plan, the State agencies,

of which the State University of New York is one, would have scaled down their work force, saved money, and avoided layoffs.

Had the State University not been able to fill some of the vacancies created by early retirements, chaos would have resulted. SUNY would have had faculty ready to teach but an inadequate support staff to operate the campuses. Fortunately, the University was granted authorization to reallocate positions within the University to address the balance problem. The reallocation, however, still had to result in the number of positions in the total SUNY work force remaining unfilled being equal to the number of employees who opted for early retirement.

Even though the need to lay off SUNY employees was avoided, the impact of this 1983 early retirement plan on the State University was complicated by the fact that, unlike other state agencies where all employees were members of the New York State Employees' Retirement System (ERS), SUNY had two other retirement systems to deal with. The New York State Teachers' Retirement System (TRS) and TIAA/CREF were optional retirement systems open to faculty and other academic and professional support staff in the State University. In 1983, proposals to grant the early retirement option to members of TRS and TIAA/CREF failed to pass the Legislature. Only about one-third of the SUNY work force were members of ERS and, thus, eligible for the 1983 plan. Consequently, only 76 (9%) of the 1983 early retirees were faculty. Those SUNY employees who were eligible for the 1983 early retirement option were concentrated in support areas such as physical plant, clerical support, and library services.

Perhaps, because of the requirement to hold the number of positions unfilled equal to the number of early retirees, there is a feeling within SUNY that the 1983 early retirement experiment did not work in the University's favor. This feeling ignores that fact that the operation of the early retirement option, together with actions of the Governor and the Legislature which impacted favorably on SUNY's budget, obviated the need to lay off University employees.

In late January 1983, SUNY faced a reduction of 3,018 positions. By the middle of March, the University had received tentative approval for a plan which would reduce 490 positions through layoffs and 206 positions through attrition. In late March, 314 SUNY employees were sent layoff notices. By the end of April 1983, all of those layoff notices had been rescinded.

Since the 1983 early retirement option had not been made available to the majority of the faculty, academic, and professional support staff, another early retirement option was discussed for the rest of the University's work force. Under the 1984 plan, budgetary savings would not drive the plan.

B. The 1984-1985 Early Retirement Option

In the interest of similar treatment, the 1984-85 early retirement option would grant three years additional credit to members of TRS or an annuity of approximately equal value to members of TIAA/CREF who opted to retire early. Vacancies created could be used to provide promotional opportunities for employees and for positions which might be filled by women and minorities.

SUNY administrators and representatives of the Executive Branch, working with the Legislature, fashioned new legislation for 1984-85. The 1984-85 plan was designed to be cost neutral. Dollars left after all expenses related to early retirement were paid, were to be spent to hire

personnel to satisfy the University's employment goals. Approximately 45% of the final year's salary for each person who opts for early retirement is required to fund the program. SUNY will amortize the cost plus interest over a five-year period. Each year of the five years will cost between 11 and 12% of the early retirees annual salary leaving almost 90% of each retiree's salary to fund new positions.

The necessary legislation finally passed in July and was signed into law by the Governor in August 1984. Again, the timing was poor from a University standpoint as most of the faculty are away from our campuses during the summer months.

Teams from the University's central office visited the campuses in the fall to explain the 1984 early retirement option. Each eligible employee had until December 1, 1984, to decide whether he or she would retire sometime between June 1, and September 1, 1985.

The annuity of approximate equal value to three years additional service credit for members of the TRS was let out to bid. Three companies vied for the business. The Metropolitan Life Insurance Company was awarded the contract for the TIAA/CREF members of SUNY who opted for early retirement.

Under the 1984 plan, 809 SUNY employees, including one campus president, opted to retire early. Five hundred and seven (83%) of the 1984 early retirees came from instruction and departmental research positions as contrasted with 76 (9%) a year earlier. The University plans to fill 548 positions by September 1985, with an additional 25 positions filled by February 1, 1986. Thus, 94% of the 1984 early retirement vacancies will be filled by the beginning of the second semester of the 1985-86 academic year.

As of this writing, it is too soon to declare the SUNY experience as a success in respect to the goals of increased affirmative action appointments and a rebalancing of faculty and staff to match more closely new enrollment patterns. Each campus is currently recruiting replacement staff and a more thorough analysis cannot be available until after the Spring 1986 semester begins.

EARLY RETIREMENT SUMMARY 1983-1984

Campus Type	1983	1984	Total
University Centers (4)	282 (33%)	189 (31%)	471 (33%)
Medical Centers (2)	116 (14%)	36 (06%)	152 (10%)
Arts and Sciences (13)	233 (27%)	266 (44%)	499 (34%)
Ag. and Techs. (6)	87 (10%)	74 (12%)	161 (11%)
Specialized Colleges (4)	33 (04%)	14 (02%)	47 (03%)
Statutory Colleges (2)	87 (10%)	22 (04%)	109 (08%)
Central Administration	13 (02%)	8 (01%)	21 (01%)
Total	851 (100%)	609 (100%)	1,460 (100%)

EMPLOYEE CATEGORY

Faculty	76 (09%)	507 (83%)	583 (40%)
All Others	775 (91%)	102 (17%)	877 (60%)
Total	851 (100%)	609 (100%)	1,460 (100%)

FOOTNOTES

1. Barbara Ann Mitchell, "Early Retirement in Higher Education," (Ph.D. dissertation, University of Oregon), p. 11.

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4. William F. Heller, II, "Considerations in Establishing Early Retirement Incentives," Journal of College and University Law, 1979-8": Vol. 6, No. 1, p. 123.

5. Mitchell, p. 11.

6. Heller, p. 123.

7. Carl V. Patton, Academia in Transition, 1979, p. 5.

8. Ibid., p. 13.

9. Kenneth P. Mortimer and Michael L. Tierney, "The Three 'R's' of the Eighties," ERIC, 1979, p. 35.

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12. Stacey E. Palmer, "Early Retirement: For Some Teachers, Financial Incentives Seem Inadequate," Chronicle of Higher Education, February 1, 1984, 23: 3.

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14. Hans H. Jenny, Early Retirement, TIAA, 1974, pp. 10-11.

15. Francis P. King and Thomas J. Cook, Benefit Plans in Higher Education, Columbia University Press, 1980, pp. 105-6.

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17. Ibid., p. 82.

18. Mitchell, p. 17.

19. King and Cook, p. 109.

20. Carl V. Patton, Diane Kell, and Joseph Zelan, "A Survey of Institutional Practices..., A Final Report," p. ii.

21. King and Cook, p. 103.

22. Employee Relations Weekly, p. 131.

23. Jenny, p. 7.

24. Ibid., p. 10.

25. Patton, p. 6.

26. Mitchell, p. 93.

27. Ibid., p. 94.

28. Patton, Kell, and Zelan, p. v.

29. Ibid., p. vii.

30. King, p. 88.

31. Ibid.

32. King and Cook, p. 111.

33. Mitchell, p. 5.

34. King, p. 90.

35. Debra Covert-McGrath, "NACUBO Report: Retirement", Business Officer, May 1984, p. 15.

36. Employee Relations Weekly, p. 134.

37. Patton, pp. 187-93.

38. David S. P. Hopkins, "An Early Retirement Program for the Stanford Faculty," 1972, p. 2, and Taylor and Coolidge, p. 185.

39. Taylor and Coolidge, p. 183.

40. Patton, pp. 193-5.

41. Ibid., pp. 186-7.

42. King, p. 94.

43. King, p. 94 and Jenny, p. 13.

44. Patton, Kell, and Zelan, p. v.

45. King, p. 87.

46. Patton, Kell and Zelan, p. iv.

47. Ibid., p. vii.

48. TIAA/CREF, "Report on Early Retirement", November 1982, p. 1.

49. Palmer, p. 24.

50. Patton, Kell, and Zelan, p. iv.

51. Jeanne Prial Gordus, Leaving Early, Upjohn Institute, 1980, p. 70.

52. Ronald Alsop, "As Early Retirement Grows in Popularity, Some Have Misgivings", Wall Street Journal, April 24, 1984, p. 1.

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54. Mitchell, p. 12.

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X. CAMPUS BARGAINING AND THE LAW: AN UPDATE

A. LABOR RELATIONS ISSUES AND THEIR EFFECT ON COLLECTIVE BARGAINING

B. DISCRIMINATION ISSUES AND THEIR EFFECT ON COLLECTIVE BARGAINING

C. LABOR LAW AND THE QUESTION OF TRADITIONAL GOVERNMENT FUNCTIONS

CAMPUS BARGAINING AND THE LAW: AN UPDATE
A. LABOR RELATIONS ISSUES AND THEIR EFFECT ON COLLECTIVE BARGAINING

Nicholas DiGiovanni, Jr., Esq.
Morgan, Brown & Joy
Boston, Massachusetts

INTRODUCTION

During the last fifteen months, there have been numerous decisions issued by both the National Labor Relations Board and the courts which have left the arena of labor relations with a very different structure than before.

A few of these decisions have been industry specific in nature. For example, in a decision of enormous consequence for hospital employees, the National Labor Relations Board ruled that it would no longer recognize seven groups of health care employees as potentially appropriate bargaining units (physicians, registered nurses, other professionals, technical employees, business office clericals, service and maintenance employees and skilled maintenance employees). The Board had ruled that, with few exceptions, these seven groups could accommodate the entire employee complement in most hospitals and that by limiting units to these seven, the Board would respect Congress' admonition in the legislative history of the 1974 amendments to give "due consideration ... to preventing proliferation of bargaining units in the health care industry".

However, in St. Francis Hospital, 271 NLRB No. 160 (1984), a new Board majority ruled that instead of a community of interest test, what is required in the health care field is a disparity-of-interest test under which two basic units of professional or nonprofessional employees would normally be considered appropriate unless there are "sharper than usual differences" between the wages, hours and working conditions of the petitioned employees and those in an overall professional or nonprofessional unit.

If viewed in terms of legal presumptions, then, a petitioned unit of anything less than all professionals or all nonprofessionals will now be presumptively invalid unless the union can establish a very clear disparity of interest between the group it is seeking to represent and all other professionals and nonprofessionals. In terms of future organizing within the health care field, the St. Francis decision could very well have the same chilling effect as Yeshiva University did in the field of

higher education. Unions will be hard pressed in most instances to obtain majority support among all professionals or all nonprofessionals, and under St. Francis they will be hard pressed to establish the appropriateness of any unit smaller than these two.

LEGAL DEVELOPMENTS

A. Yeshiva Cases

While St. Francis was by far and away the most significant bargaining unit decision to be issued in 1984, there was also some new guidance from the Board and the courts on the issue of the managerial status of faculty in the wake of NLRB v. Yeshiva University, 444 U.S. 672, 103 LRRM 2526 (1980).

Since the Supreme Court's decision in NLRB v. Yeshiva University, the NLRB has had a number of cases in which institutions have argued for the total exclusion from the Act of their faculty as managerial employees. In a few of these cases, the Board has found sufficient managerial authority to warrant exclusion under the rationale of the Court's decision in Yeshiva. Ithaca College, 261 NLRB No. 83, 110 LRRM 1059 (1982); Thiel College, 261 NLRB No. 84, 110 LRRM 1041 (1982); Duquesne University, 261 NLRB No. 85, 110 LRRM 1046 (1982); and College of Osteopathic Medicine, 265 NLRB No. 37, 111 LRRM 1523 (1982), as well as some regional decisions involving Seton Hall, University of New Haven and Wagner College.

On the other hand, the Board has found other faculty members not to be managerial under Yeshiva. See, for example, Bradford College, 260 NLRB No. 81, 110 LRRM 1055 (1982); Loretto Heights College, 264 NLRB No. 149, 111 LRRM 1680, aff'd. 117 LRRM 2225 (10th Cir., 1984); Florida Memorial College, 263 NLRB No. 160, 111 LRRM 1547 (1982); Lewis University, 265 NLRB No. 157, 112 LRRM 1206 (1982); New York Medical College, 263 NLRB No. 124, 111 LRRM 1128 (1982).

There are three new cases to comment upon today in this area. First, in September of 1984, the Tenth Circuit in Denver upheld the NLRB's ruling in Loretto Heights College, supra, that the faculty at that institution were not managerial. In analyzing the evidence, the Court noted first that there were several areas of governance in which faculty at the College played little or no role. These included business affairs, such as the lease and sale of real estate, purchasing of supplies and the employment and termination of nonacademic personnel; the admission, retention and expulsion of students; the size of the student body; establishing tuition requirements and making financial aid determinations. However, the Court said that the lack of authority in these areas really was not crucial. Instead:

> Since the 'business' of a university is education Yeshiva, 444 U.S. at 688, we must focus our attention on the faculty's role in academic affairs in order to determine the question of managerial status. 117 LRRM at 2231.

The Court then dissected the College's committee structure in this regard, observing that some committees, like the Faculty Review Committee, met only infrequently; others, like the Faculty Evaluation Committees, which did not evaluate anyone but only established evaluation procedures, were relatively insignificant; and that still others were dominated by a majority of administrators rather than faculty.

> As these examples make clear, faculty power at the College, whatever its extent on paper, is in practice severely diluted. In light of the infrequent or insignificant nature of some committee work, the mixed membership of many committees, the faculty's limited decision-making authority and the layers of administrative approval required for many decisions, the impact of faculty participation in College governance falls far short of the 'effective recommendation or control' contemplated by Yeshiva. 117 LRRM at 2232.

The Court took particular note of the fact that the College in this case, unlike the Yeshiva administration, was not compelled to rely upon the faculty for advice, recommendations, establishment and implementation of policies. The Court noted that at Loretto Heights, the administration was fairly large in relation to the size of the College and, even more significantly, the College had a "very effective buffer" between top management and the faculty in the form of the program directors. These program directors functioned as administrators within their particular program, handling the budget, holding key committee positions, coordinating the program, etc. The activity of these directors, especially when combined with the strong role of the Academic Dean, led both the NLRB and the Tenth Circuit to conclude that the faculty were not aligned with management in this case.

The second decision of recent vintage in this area is Cooper Union, 273 NLRB No. 214 (1985) in which the Board reversed the findings of an administrative law judge and held that the faculty at that institution were not managerial employees. This case arose, not in a representational context, but rather as an unfair labor practice when the College ceased dealing with its faculty union in the wake of Yeshiva. The union had been voted in as the representative of a full-time faculty unit in 1974.

In this case, the faculty's role in the governance of the institution, at least on paper, was quite extensive, touching upon most of the key areas discussed in Yeshiva and its progeny. However, the record revealed a difference in practice. For example, despite formal control over curriculum, the faculty's actual authority was seen quite differently. The Board cited the administration's creation and elimination of entire degree programs either without faculty input or over faculty opposition. The Board also observed that the governance structures themselves had been amended without faculty vote; that a special admissions program was established without faculty approval; that administrators played a heavy role on all important committees; that the administration entered into a library consortium agreement over massive faculty opposition based on academic grounds.

The Board also noted that, unlike the case in College of Osteopathic Medicine, supra, where faculty comprised 100% of the membership of key committees, only one out of 14 faculty committees at Cooper Union was comprised entirely of faculty members.

Finally, in nonacademic areas, such as budget, facilities planning and personnel decisions, the Cooper Union faculty lacked substantial input. For example, final decisions on hiring, promotion, tenure and retention of teaching staff were frequently made in the absence of faculty recommendations, and in other cases, after rejection of faculty recommendations.

Finally, in the continuing odyssey of Boston University, an administrative law judge ruled last summer that the B.U. faculty had sufficient managerial authority under the guidance of Yeshiva to be excluded from the coverage of the Act. Trustees of Boston University case no. 1-CA-11061 (June 29, 1984). The ALJ relied on several factors in reaching his decision. While noting that faculty had little control over budgetary matters or decisions affecting the size of the University, they did have significant authority over curriculum, academic and degree standards, student admissions and faculty personnel decisions which set them apart from "employees" under the Act.

The ALJ found that faculty had a "shared authority" with the dean and the admissions office in undergraduate admissions and complete authority over graduate admissions. The faculty, through its committees, had effective control over establishing new degree programs and curricular changes, complete authority on setting academic standards and retention of students and how the courses will be taught.

On personnel matters, the ALJ found exclusive control by faculty over recruiting new faculty and shared authority with the dean on evaluating the qualifications of prospective faculty. Out of 242 faculty appointments over a five-year period, 218 were recommended by department faculties.

Faculty involvement in other personnel decisions was substantial, and the ALJ noted a concurrence rate of 77 percent between faculty recommendations in tenure and final action by the trustees.

A few points seem in order about the Board's development of the case law after Yeshiva. The first is that the Board will scrutinize the reality of faculty power rather than mere paper authority. Lofty statements in by-laws about faculty control will be of little weight if the actual practice is otherwise. This is a sound approach, and it puts a high premium on an effective and detailed presentation of the evidence.

However, what still seems to be missing from these decisions is a clear sense of the priority importance of the myriad of factors introduced in these cases. What type of authority will be deemed sufficient to pass the threshold into managerial authority? If a faculty has little or no control over personnel matters but clear control over curriculum and academic standards, will that be enough to find them managers? The cases cite so many factors under consideration that it still remains difficult to perceive what the truly determinative factors are in these decisions.

One should also be mystified at the importance the Board seems to be giving in such cases as Loretto Heights and Cooper Union to the precise percentage of faculty membership on governance committees. Whether a particular committee is comprised of a majority percentage of faculty should not be accorded the weight it is being given by the NLRB. What is important is the fact that faculty are sitting on these committees as co-managers with administrators to decide significant policy and personnel matters for the institution. Whether or not the faculty comprise a clear majority of membership seems to establish a mechanical formula that may demean the importance of the faculty's role and may do violence to the whole concept of "shared authority", on a college campus, which is the underpinning of the managerial exclusion.

Another emerging factor in these cases which bears watching is the Board's focus on intermediate supervision, i.e., whether there is a "buffer" between higher administration and faculty. For example, to the

extent a petitioning union can establish a powerful role for department chairmen, program directors or similar classifications below the level of Dean, the greater it would appear to be able to establish the nonmanagerial status of faculty.

I would point out that this makes for a peculiar irony since in the early and mid-1970's most of the unions' best arguments for not excluding chairmen as supervisors centered on establishing their shared authority with their department faculty. Now it would appear the more a union can show strong, independent chairmen, set off from their faculty in terms of authority, the better their chances will be to avoid a complete managerial exclusion of all faculty. (See also Vermont Federation of Teachers, AFT, AFL-CIO and Vermont State Colleges, 7 VLRB 6 (1985), where Colleges' argument that Coordinators of Instruction and Advisement at the Community College were all managerial employees due to both individual and collective authority was rejected by the Vermont Labor Relations Board).

In another bargaining unit decision affecting faculty, the Board ruled in Parsons School of Design (New School for Social Research), 268 NLRB No. 154, 115 LRRM 1134 (1984), that a unit limited to the school's part-time faculty members was appropriate for bargaining, the Board finding a sufficient community of interest by virtue of identical employment contracts, a common method of compensation, and similar working conditions.

B. Other NLRB Rulings

In addition to these college bargaining unit cases, the NLRB issued a significant number of major policy decisions which affect all employers, including colleges and universities. In addition to their importance to private institutions subject to the jurisdiction of the National Labor Relations Act, these decisions are also important for their persuasive effect on state labor boards, who may rule on comparable matters involving state institutions.

C. Deferral to Arbitration

One of the ongoing issues over the years has been to what extent the NLRB would defer to the grievance and arbitration provisions of a collective bargaining agreement in cases where the unfair labor practice charge involves a managerial action which also could be challenged under the grievance procedure. Last year, in United Technologies, 268 NLRB No. 83 (1984) and Olin Corp., 268 NLRB No. 86 (1984), the National Labor Relations Board issued significant rulings which gave greater deference to the grievance and arbitration procedures in collective bargaining agreements. In the United Technologies decision, the Board overruled an earlier decision in General American Transportation, 94 LRRM 1483, which had allowed deferral to the grievance-arbitration machinery only in cases alleging a Section 8(a) (5) refusal-to-bargain charge. The NLRB has now returned to the policy originally established in 1971 in Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931, that it will also defer cases alleging violations of the interference, restraint-or-coercion and discrimination provisions of the Act, Sections 8(a) (1) and (3). This decision significantly broadened the deferral arena and means that many more unfair labor practice charges will be sent back to the grievance procedures in the first instance before being looked at by the Board.

In the Olin Corp. decision, the Board clarified its guidelines as to when it will ultimately defer to the arbitrator's decision in ruling upon parallel unfair labor practice charges. The Board stated that the standards for deferral to arbitration awards are the following:

1. The requirement that an arbitrator adequately consider the underlying unfair labor practice issue is satisfied "if the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue."

2. The Board will not defer if the award is "clearly repugnant" to the Act.

3. With respect to whether an award is "clearly repugnant", it is no longer necessary, however, that the award be "totally consistent with Board precedent."

4. The case will generally be deferred unless the award is "palpably wrong, i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act."

5. The party seeking to have the Board reject deferral and consider the merits of a given case must bear the burden of showing the deferral standards have not been met.

Both of these cases represent the Board's commitment to the national policy which favors arbitration as a means of resolving labor disputes. The Board noted also that "the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief."

In several other decisions in 1984, the Board followed these principles in deferring to arbitration awards. Combustion Engineering, Inc., 272 NLRB No. 32 (1984) (deferral of Section 8(a) (3) charge to arbitrator's award involving the discharge of two employees); Badger Meter, Inc., 272 NLRB No. 123 (1984) (deferral to arbitration award permitting management to sub-contract).

D. Individual v. Concerted Activity

Section 7 of the National Labor Relations Act protects employees who engage in "concerted activity for the purpose of collective bargaining or other mutual aid or protection." In most cases, the term "concerted activity" has involved actions by two or more employees, such as strike activity. However, in Alleluia Cushion Co., 221 NLRB 999, 91 LRRM 1131 (1975), the NLRB had ruled that an individual worker's assertion of a matter of common concern to his co-workers constituted protected concerted activity, even if none of the other workers were involved in the employee's activities or even knew about it. Since 1975, there had been a developing line of cases in which employers had been found guilty of unfair labor practices by discharging or disciplining individual employees who took individual actions separate and apart from their fellow workers to improve working conditions or to assert statutory rights, such as filing notices of safety violations with enforcement agencies.

Last year, in Meyers Industries, 268 NLRB No. 73, 115 LRRM 1025, the NLRB reversed this trend. In specifically overruling Alleluia Cushion, the Board said that in order to find an employee's activity to be "concerted":

> we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.

Thus, if an employee acts with other employees, his/her action is concerted. If the employee acts on the specific authority of other employees, his/her action is concerted. However, the fact that other employees may share the same concerns of the employee will not by itself establish that they have authorized that employee to act. In such cases, the employee is acting alone and, whatever other protections he may have, he will not enjoy the protection of Section 7 of the NLRA.

A number of cases followed Meyers in which the NLRB found no concerted activity under this standard. American Standard, 116 LRRM 1171 (1984) (filing for Workmen's Compensation benefits did not constitute concerted activity, where the employee acted alone and solely on his own behalf); ABF Freight Systems, 116 LRRM 1330 (1984) (a driver's refusal to drive a tractor-trailer that he claimed had faulty brakes did not constitute concerted activity); Litton Systems, 117 LRRM 1092 (1984) (filing OSHA complaint is not concerted activity). Collins Refractories, 272 NLRB No. 135, 117 LRRM 1417 (1984) (no violation when employer refused to recall an employee who filed an unemployment compensation claim). Cf. Chaney Creek Coal, 116 LRRM 1445 (1984) (concerted activity found when an employee complained about a change in working hours because earlier the same employee had joined co-workers in sending their leadman to voice their dissatisfaction with the new hours).

A separate but related line of cases had developed over the years regarding whether or not a lone employee's assertion of a right under a collective bargaining agreement could be considered concerted activity. In Interboro Contractors, 157 NLRB 1295, 61 LRRM 1537 (1966), the Board ruled that the efforts of a single employee acting alone to claim rights under a collective bargaining agreement were protected under Section 7. The Board felt that even though the employee was acting alone, the collective bargaining agreement itself was brought about by the concerted activity of employees and, therefore, asserting any rights under that document attired the employee in the cloak of concerted activity.

This so-called Interboro doctrine met with mixed results in the Circuit Court of Appeals. Several circuits had agreed with the Board. Roadway Express, Inc. v. NLRB, 532 F.2d 751, 91 LRRM 2239 (4th Cir. 1976); NLRB v. Ben Pekin Corp., 452 F.2d 205, 78 LRRM 2429 (7th Cir. 1971); NLRB v. Selwyn Shoe Mfg., 428 F.2d 217, 74 LRRM 2474 (8th Cir. 1970). Some had rejected the doctrine. Kohls v. NLRB, 104 LRRM 3049 (D. C. Cir. 1980); ARO Inc. v. NLRB, 596 F.2d 713, 101 LRRM 2153 (6th Cir. 1979).

However, last year in NLRB v. City Disposal System, 104 S.Ct. 1505, (1984), the United States Supreme Court resolved this conflict by upholding the Board's position and agreeing that an individual employee does engage in concerted activity when he asserts a right under the contract. In City Disposal, a truck driver refused to drive a truck that he believed to have unsafe brakes. He was discharged, and he grieved under the contract. The contract provided that employees would not be

required to operate any vehicle that was not in safe driving condition, and that an employee's refusal to operate such equipment was not a violation of the agreement. The union failed to take the employee's case to arbitration, but the employee filed an unfair labor practice with the Board.

In a 5-4 decision, the Supreme Court agreed with the Board that the employee's action was concerted. In the most telling paragraph, Justice Brennan explained:

> When...Brown refused to drive the truck...he was in effect reminding his employer that he and his fellow employees...had extracted a promise that they would not be asked to drive unsafe trucks. He was also reminding his employer that if he persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that provision. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. 104 S.Ct. at 1511.

Ironically, the factual setting of this case was very similar to that in Meyers Industries, where the Board found no concerted activity in the absence of a collective bargaining agreement. The distinction is a thin one, and in February of this year, the D.C. Circuit Court of Appeals reversed the Board and ordered it to reconsider its ruling in Meyers Industries. Prill v. NLRB (D.C. Ct. App., Feb. 26, 1985). That decision only applies to the D.C. Circuit, of course, but it may foreshadow other circuits analyzing the Board's rationale in Meyers with possible Supreme Court resolution at a later date.

Employers should remain cautioned that even if Meyers ultimately survives judicial scrutiny, an employee may still be able to sue for his or her job back under one of the evolving theories of wrongful discharge. For example, while filing a charge of safety violations may not be considered concerted activity under the NLRA, a discharge for such a filing may offend a state's public policy and result in a wrongful discharge lawsuit in state court.

E. Solicitation Policies and Election Rules

In another key reversal this past year, the Board decided that rules which prohibit solicitation and distribution of literature during "working time" are presumptively valid since they state with sufficient clarity that employees can solicit on their own time. Our Way, Inc., 115 LRRM 1009 (1983). The Board thus overturned T.R.W., Inc., 107 LRRM 1481 (1981), in which it stated that rules banning solicitation during "working hours" continued to be illegal and, further, that rules that banned solicitation during "working time" were also presumptively invalid unless they further specified what is working time and what is not. The Board in Our Way went back to earlier rulings and reestablished the long-held standard that rules banning solicitation during working time state with sufficient clarity that employees may still solicit during the work day while they are on their own time.

In another case affecting employer conduct during a union campaign, the Board held that an employer's interrogation of an open, well-known union supporter concerning his union sympathies were not

coercive and thus did not violate Section 8(a)(1) of the Act. Rossmore House, 116 LRRM 1025 (1984). In this case, the employee had been asked why he supported a union and whether the union charged a membership fee. The decision reversed prior case law that held that such interrogation, even if not accompanied by threats of reprisal or promises of benefit, is inherently coercive. PPG Industries, 105 LRRM 1434 (1980).

The Board stressed that interrogation of well-known union adherents may still be coercive when examined against all surrounding circumstances (e.g., the nature of the information sought, place or method of interrogation, accompanying threats or promises). Moreover, employers should not interpret this ruling as authorizing general interrogation of employees about their union sympathies. This ruling does not apply to employees in general, but only to well-known union supporters.

F. **Union Majority Status Necessary for a Bargaining Order**

In 1969, the Supreme Court ruled that the NLRB had the power to issue bargaining orders to remedy unfair labor practices that "have the tendency to undermine majority strength and impede the election process". NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 1481 (1969). In Conair Corp., 261 NLRB 1189 (1982), the Board held that it had the authority under Gissel to issue a bargaining order even if the union had never represented a majority of the unit employees, in those cases where the employer's unfair labor practices were so "outrageous" and "pervasive" that only a bargaining order could repair the unlawful effects of the employer's activities.

However, in May of 1984, the Board reversed Conair and held that it did not have the authority to issue bargaining orders in cases where the union had never held a majority status. Gourmet Foods, 270 NLRB No. 113 (1984). The Board, relying in large part on Section 9(a) of the Act, ruled that no matter how outrageous an employer's unfair labor practices, the Board simply does not have the statutory power to issue a bargaining order when there is no showing that the union has a majority status.

G. **Sympathy Strike Waivers**

Just two months ago, the NLRB reevaluated and reversed earlier precedent on the question of whether a no-strike clause in a collective bargaining agreement which does not specifically mention sympathy strikes nevertheless bans such strikes. For a number of years, the Board had held that the right to engage in a sympathy strike or the right to refuse to cross a picket line was an important right under the National Labor Relations Act and that such a right was not waived merely because the parties to a contract signed off on a broad no-strike clause. There had to be evidence either in the language of the clause itself or in the background to the bargaining that the union clearly and unmistakably waived the right to engage in sympathy strikes. (See W-I Canteen Service, 99 LRRM 1571 (1978); U.S. Steel Corp., 111 LRRM 1200 (1982)).

However, in Indianapolis Power & Light Co., 118 LRRM 1201 (1985), the Board concluded that a union waived the employees' right to engage in sympathy strikes when it agreed to contract language which prohibited each employee "from causing, encouraging, permitting, or taking part in any strike, picketing or sit-down". With this ruling, it would not appear that a broad no-strike clause will be sufficient to bar sympathy strikes even if there is no specific mention of them.

H. Right to Representation at Investigatory Interviews

In NLRB v. J. Weingarten, 420 U.S. 251 (1974), the Supreme Court had held that a unionized employee had the right to the presence of a union representative at an investigatory interview which the employee reasonably feared could result in discipline. Both the Board and the Court agreed that an employee should not be required to participate in such an employer action alone without his or her designated bargaining representative should such representation be requested.

Several years later the Board applied the same rationale to non-unionized settings, holding that a non-unionized employee also has the right to a representative under such circumstances. Materials Research, 262 NLRB 1010, 110 LRRM 1401 (1982).

However, in late February of this year, the NLRB reversed this decision and ruled that an employee who is not represented by a union does not have the right to demand the presence of a representative at an investigatory interview he believes will lead to the imposition of discipline. Sears, Roebuck & Co., 174 NLRB No. 55 (Feb. 22, 1985). The employee involved in this case was brought in for a disciplinary interview. He asked for the presence at the interview of a representative of a union that was seeking to organize the employees at his facility. The request was denied and the employee was fired.

In upholding the right of the company to deny the employee a representative at the hearing, the Board wrote:

> When no union is present, the imposition of Weingarten rights upon employee interviews wreaks havoc with fundamental provisions of the Act. This is so because the converse of the rule that forbids individual dealing when a union is present is the rule that, when no union is present, an employer is entirely free to deal with its employees on an individual, group or wholesale basis.

In a related case, the NLRB also ruled that a make-whole remedy is not appropriate where there is a Weingarten violation unless the employee was disciplined or discharged for asserting his or her right to representation. Taracorp Industries, 273 NLRB No. 54 (1984). Thus, where the only unfair labor practice is the denial of the right to representation, the proper remedy is a cease-and-desist order and the posting of the traditional notice to employees.

I. Duty of Fair Representation

There were a few cases last year dealing with a union's duty of fair representation. In Office and Professional Employees International Union, 268 NLRB No. 207 (1984), an employee was asked by her employer to resign and she did so. Fifteen days later she called the union, asked how much time she had to file a grievance and was told 30 days. Two days later she sent the union president a detailed letter about the events leading to her discharge. The union president did not think there were valid grounds for a grievance but failed to tell her. The employee eventually filed Section 8(b)(1)(A) charges after the union let the time lapse for filing a grievance.

The NLRB, however, found no violation. In order for there to be a breach of the duty of fair representation, the Board wrote, there must

be a finding that the union's conduct was arbitrary or based on irrelevant, invidious or unfair considerations. Something more than mere negligence is required, and, here, that is all there was. The Board added that in this case the employee herself had the right under the collective bargaining agreement to file a grievance on her behalf but did not do so.

State courts and labor boards also developed case law on the issue of the duty of fair representation.

In Goolsby v. City of Detroit, 1984-86 PBC Par. 34378 (Mich. 1984), the breach of the union's duty to represent its members fairly could be established without a showing of bad faith or unlawful intent. In that case, the union inexplicably failed to take to arbitration a major grievance involving work assignments. While the court did not hold that mere negligence would create a breach of the duty of fair representation, it did say that "irrational, unreasoned or inept conduct undertaken with indifference to the interests of those affected" could constitute a breach of the duty. By such language, the court admittedly went beyond the general federal standard of conduct necessary to establish a breach of the duty of fair representation, namely, conduct which is "arbitrary, discriminatory or in bad faith". Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). Unions in the public sector, then, must remain mindful of differing standards which may be applied in different states.

In Bowman v. TVA, 1984-86 PBC Par. 34295, a contract provision which gave preference to union members over nonmembers in the unit in avoiding involuntary transfers was deemed invalid. The union had argued that the transfer preference was a limited union security provision and less burdensome on employees than either a union shop or an agency shop, both of which are valid. However, the Court of Appeals held that the fact that the union could have negotiated a traditional security clause does not make the instant provision acceptable and does not relieve the union of its obligation to fairly represent employees who have chosen not to join the union.

The Pennsylvania Supreme Court held in Martino v. TWU Local 234, 1984-86 PBC Par. 34222 that, in a duty of fair representation case involving the employee's discharge, the employee may sue the employer as a co-defendant but the remedy against the employer will be limited to ordering the employer to proceed to arbitration. The Pennsylvania Public Employee Relations Act mandates that arbitration will be the exclusive remedy for contract disputes and, thus, contrary to federal law, the employee cannot sue the employer directly for breach of contract.

J. Agency Service Fees

In Ellis v. Railway Clerks, 104 S. Ct. 1883, 100 L.C. Par. 10939 (1984), the U.S. Supreme Court held in a case arising under the Railway Labor Act that a union's agency shop rebate scheme, pursuant to which objecting employees were rebated that portion of their dues, or service fees that were spent on union political activities, was unlawful. The pure rebate approach was inadequate to bring the union within compliance with the judicially recognized proscription on the use of objecting employees' money to support political causes. Even if the union were to pay interest on the amount refunded, it would still have obtained an involuntary loan for purposes to which the employee objected.

The Court also noted that the relevant test for determining the appropriateness of a union's use of dues or service fees on expenditures objected to by employees is whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the

duties of an exclusive representative of employees in dealing with an employer on labor-management issues. In this light, the Court held it was proper for a union to apply the dues or service fees of objecting employees to expenditures made in holding national conventions; in purchasing refreshments for occasional social activities and business meetings; and for publishing a monthly magazine. However, the dues and fees could not be used for organizing purposes.

In Champion v. California, 1984-86 PBC Par. 34256 (9th Cir. 1984), the Ninth Circuit held that the determination of whether fair share fees expenditures are proper depends on the nature of the bargaining process. Since collective bargaining in the public sector requires resort to the legislature, the Court recognized that certain lobbying activities might well constitute permissable fair share fee expenses.

In Robinson v. State of New Jersey, 1984-86 PBC Par. 34230 (3rd Cir. 1984), the Court upheld as constitutional a New Jersey statute authorizing representation fees collected from non-union employees to be used in support of lobbying activities related to collective bargaining.

In Hudson v. Chicago Teachers Union, 1984-86 PBC Par. 34302 (7th Cir. 1984), a union procedure for determining the amount of fair share fees and the means for non-members to challenge such fees was unconstitutional. The First Amendment and due process considerations mandate a procedure which is fair and makes reasonably certain that the agency fee is not used to support any activity which is not germane to collective bargaining. In this case, the union unilaterally set the fees at 95% of dues and unilaterally established a procedure for challenge which included the union selecting the arbitrator.

In Hawaii Government Employees Association v. Armbruster, 681 P.2d 587 (1984), the Hawaii Appellate Court held that non-union employees could not object to a service fee provision on the grounds that it required them to pay fees in an improper unit of mixed professional and nonprofessional employees. Employees have no special right to a perfect bargaining unit or a preferred bargaining unit once a proper unit determination has been made.

K. Employment-at-Will and Wrongful Discharges

Out of all of the issues which we could discuss today in the field of labor relations, none is so dynamic and controversial as this country's mounting assault on the time-honored doctrine of employment-at-will. Despite a generally conservative labor climate, more and more cases are being issued which provide employees with far greater rights to sue their employers for wrongful discharge than were ever thought imaginable even ten years ago. The case law is evident in virtually all fifty states, covering both private and public sector employment of all types. In addition, over the last several years, various state legislatures, including Michigan and Pennsylvania, have considered bills that would specifically give employees a clear statutory right to sue their employers for wrongful discharge. These legislative initiatives are likely to continue, and probably win approval, as we move toward the twenty-first century.

The old employment-at-will theory, of course, was quite simple. If an employee did not like his work arrangements, he could quit; if the employer did not like the employee, he could fire him. No strings attached. Or, as one Tennessee court put it in 1884:

> All employers may dismiss their employees at will; be they many or few, for good cause, for no cause, or even for cause morally

wrong without thereby being guilty of a legal wrong. Payne v. Western and A.R.R. Co., 81 Tenn. 507 (1884).

Even the Supreme Court of the United States had ruled in a series of cases around the turn of the century that any regulation of the employment relationship violated the parties' freedom to contract, and therefore employers could fire employees at will if they so chose.

As we moved into more recent times, many laws have been passed which began to limit this unbridled employer freedom. For example, the National Labor Relations Act, the Civil Rights Act of 1964, the Age Discrimination in Employment Act and comparable state acts all added bans on certain types of employer conduct in dismissing employees. However, unless an employee was a member of a protected group or had an individual contract of employment or had the protections of a collective bargaining agreement, he could still normally be discharged without any recourse. However, over the past decade especially the courts have allowed these discharged employees to sue their former employers under a variety of legal theories.

L. Public Policy Exception to Employment-at-Will Doctrine

The first great judicial exception to the employer's right to fire at will developed under the general heading of the public policy exception. Here, the case law has been developing since at least the late 1950's, and generally falls into four categories.

1. The most obvious type of public policy exception to the "at will" doctrine is the situation in which an employee is fired for refusing to commit a crime for the employer. Perhaps the seminal case in this field is a 1959 California decision, Petermann v. Teamsters Local 396, 344 P.2d 25. In that case, the defendant union had instructed its employee to give false testimony at a legislative hearing. The employee refused to commit perjury and was fired the next day. The California Court of Appeals reinstated the employee on the grounds that the employer's conduct jeopardized the policy of encouraging full and honest testimony and thus violated an important public policy that had to be protected. See also Tameny v. Atlantic Richfield, 610 P.2d 1330 (Cal. 1980), (employee could sue for his job back after he was fired for refusing to participate in an illegal price-fixing scheme); Trombetta v. Detroit, Toledo & Ironton R.R. (Mich. 1978) (employee refused to illegally manipulate and adjust sampling results for a state pollution report).

2. The second type of public policy exception centers on cases where an employee is discharged for reporting or disclosing alleged violations of the law by his employer, the so-called "whistleblowing" cases. See, for example, Harless v. First National Bank in Fairmont, 246 S.E.2d 270 (W.Va. 1978); Sheets v. Teddy's Frosted Foods, 427 A.2d 385 (Conn. 1980). Some states, like Maine and Michigan, now have statutory protections for employees who report illegal employer conduct.

3. The third very common public policy exception is protection for employees who are fired for exercising a statutory right, such as filing a Workmen's Compensation claim or reporting a safety violation under State OSHA laws. The exception is commonly applied, and several states added or extended this protection for employees during 1984. See, for example, Midgett v. Sackett-Chicago, 117 LRRM 2809 (Ill. 1984); Mead Johnson v. Oppenheimer, 458 N.E. 2d 668 (Ind. Ct. App. 1984); Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984); Clanton v. Cain-Sloan, 117 LRRM 2789 (Tenn. 1984); Thomas v. Kroger Co., 117 LRRM 2803 (S.D. W.Va., 1984).

4. The final category of public policy exceptions involves other employee activity in which public policy demands should be protected, even if there is no particular statutory protection involved. These are ad hoc cases and rest on the individual facts submitted. For example, a number of courts have found that there is a public policy of eliminating sexual harassment in the workplace and have thus upheld the right of employees to sue their employers when their discharge was based on refusal to submit to supervisors' advances. Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974); Shaffer v. National Can Corp., 117 LRRM 2062 (E.D. Pa. 1984); Lucas v. Brown & Root, 736 F.2d 1202 (8th Cir. 1984).

Other cases have provided employees with a very broad reach. For example, in a recent case out of Texas a nurse was fired for publishing an article concerning terminally ill patients, their right to die and the obstacles occasionally presented by physicians. The court upheld her right to sue for her job back based on an infringement of her free speech rights under the Texas Constitution. Jones v. Memorial Hospital System, 677 S.W. 2d 221, 117 LRRM 2915 (Tex. Ct. App. 1984).

In a Pennsylvania case, Novosell v. Nationwide Insurance Co., 721 F.2d 894, 114 LRRM 3105 (Pa. 1983), the plaintiff refused to help obtain signatures to lobby for passage of a no-fault insurance bill and was discharged by his company. The court sent the case back for trial on the grounds that if, in fact, the company fired the employee for First Amendment expression, an important public policy would be violated. Also, De La Cruz v. Pruitt, 590 F.Supp. 1286 (N.D. Ind. 1984).

While public sector employers have long had to worry about employees' constitutional rights, the fact that these cases are arising in the private sector as well raises questions as to the extent to which an employee can criticize his employer or speak out on issues before an employer can take action. Cf., however, Pierce v. Ortho Pharmaceutical, 427 A.2d 505 (1980); Lampe v. Presbyterian Medical Center, 590 P.2d 513 (Colo. 1978).

M. Implied Contract Exception

The implied contract theory is another exception to the employment-at-will doctrine and is more troublesome. Under this line of cases, the argument runs that even though there is no formal written contract between the parties, the employee may show that there is an implied contract because of certain assurances of job security which he or she received from the employer. These "assurances" may be oral or written or both, and it is in this line of cases that we find employee manuals and handbooks being elevated in stature and alleged to be contracts of employment. For example, in Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441 (N.Y., 1982), a statement in the personnel manual that the employer would discharge only "for just and sufficient cause" permitted the employee to sue for breach of contract. See also, Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W. 2d 880 (Mich. 1980); Wiskotoni v. Michigan National Bank-West, 716 F.2d 378 (6th Cir. 1983) (statement in the employee manual that during the probationary period employees could be terminated for any reason implied, in light of certain other circumstances, that after the probationary period employees could only be terminated for cause); Garrity v. Valley View Nursing Home, 10 Mass. App. Ct. 822 (1980).

However, many courts have refused to treat personnel policy manuals as the basis of implied contracts with employees. Gates v. Life of Montana Insurance Co., 638 P. 2d 1063 (Mont. 1982) (handbook was a unilateral statement of company policy and procedures and, as such,

there was no "meeting of the minds" sufficient to create a contract). See also Heideck v. Kent General Hospital, 446 A. 2d 1095 (Del. 1982); Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. App. 1983).

During the last year, there have been more judicial decisions in this area. The Colorado courts have now held that the employer's distribution to employees of handbooks or policy manuals containing specific termination of employment procedures, if relied upon by the employee and supported by the consideration of continued service, may result in the employer becoming contractually bound to comply with those procedures. Corbin v. Sinclair Mkt., 684 P.2d 285 (Colo. Ct. App. 1984);Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo. Ct. App. 1984). See also, Leikvold Valley View Hospital, 116 LRRM 2193 (Ariz., 1984).

However, the Illinois courts have refused to construe employee manual provisions as implied contract terms. In Enis v. Continental National Bank, 582 F. Supp. 876 (N.D. Ill., 1984), it was held that handbooks do not alter the at-will doctrine in Illinois except: 1) where the handbook is adopted as a modification of a pre-existing employment contract and sufficient consideration exists to create mutuality of obligation or 2) where a formal written contract does exist and that contract can be construed as subject to the policies of the employer as expressed in the handbook.

See also Luft v. Sears, Roebuck, 117 LRRM 2704 (Iowa, 1984); Owens v. City of Derby, 586 F. Supp. 37 (D.C. Kan. 1984); Thompson v. St. Regis Paper Co., 110 Wash. 2d 219 (1984).

N. Implied Covenant of Good Faith and Fair Dealing

A number of courts have now held that all contracts of employment have an implied covenant of good faith and fair dealing. For example, in Fortune v. National Cash Register, 364 N.E. 2d 1251 (Mass. 1977), the Massachusetts Supreme Judicial Court applied the covenant of good faith and fair dealing to prevent the termination of an at-will employee in order to deny him sales commissions which he had earned. But see Gram v. Liberty Mutual Ins. Co., 429 N.E. 2d 21 (Mass. 1981) (the covenant does not include a standard of just cause for discharge).

California courts have extended this doctrine to embrace a just cause standard for termination under appropriate circumstances. Pugh's v. See's Candies, Inc., 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, 168 Cal. Rptr. 722 (1980). A recent California case held, however, that to maintain an action for breach of the implied covenant of good faith against the employer, the employee must state the particular policies and statements that would lead him to believe he would not be discharged without cause. Wilson v. Vlasic Foods, Inc., 116 LRRM 2419 (D. Cal. 1984).

While New York has allowed suits for breach of contract based on statements made in employee manuals, it has rejected the argument that the covenant of good faith and fair dealing may prevent the termination of an at-will employee. Murphy v. American Home Products, 448 N.E. 2d 86 (N.Y. 1983). See also Walker v. Modern Realty of Missouri, 675 F.2d 1002 (8th Cir. 1982); Martin v. Federal Life Ins., 440 N.E. 2d 998 (Ill. 1982).

In Magnan v. Anaconda Industries, 117 LRRM 2163 (Conn. Supt. Ct. 1984), the Connecticut Court held that an action for breach of implied covenant of good faith and fair dealing cannot be predicated simply on the absence of good cause for discharge. When employment is clearly "at-will", a party will not be deemed to have lacked good faith in

exercising its contractual right. See also Tobin v. Goggins, 17 Mass. App. 996, 459 N.E. 2d 835 (Mass. App. 1984).

O. Abusive Discharge

A fourth line of cases has centered on the abusive discharge situations, cases where an employee is fired as a result of resisting employer attempts to intimate or coerce him in some way that bears no reasonable relationship to the employment or where the circumstances of the discharge itself are abusive. For example, in Agis v. Howard Johnson's, 355 N.E. 2d 315 (Mass. 1976) a waitress was fired for suspected theft. When no one had confessed to the theft as the manager requested, he simply began firing waitresses in alphabetical order, starting with the plaintiff. The Massachusetts court found this conduct so abusive that it allowed the plaintiff to sue on the tort theory of infliction of emotional distress. See also Hubbard v. United Press International, 330 N.W. 2d 428 (Minn. 1983); M.B.M. Company, Inc. v. Counce, 596 S.W. 2d 681 (Ark. 1980).

Courts have generally held that the termination of employment itself will not, in and of itself, constitute extreme and outrageous behavior sufficient to allow a tort action. See, for example, Eklund v. Vincent Brass and Aluminum, 351 N.W. 2d 371 (Minn. App. 1984); Ledl v. Quik Pik Food Stores, 394 N.W. 2d 529 (Mich. App. 1984).

However, if the act of termination is carried out in a humiliating manner, a tort claim may lie. Rulon-Miller v. IBM, 162 Cal. App. 3d 241, modified, 162 Cal. App. 3d 118 (1984). Cf. Murphy v. American Home Products, supra.

EXTENSION OF FAIR LABOR STANDARDS ACT TO STATE AND LOCAL EMPLOYEES

In a major decision issued in February of this year, the Supreme Court overruled its decision in National League of Cities v. Usery, 22 WH Cases 1064, and held that nothing in the overtime and minimum wage requirements of the Fair Labor Standards Act, as it is applied to a local metropolitan transit authority, violates any constitutional provision. Garcia v. San Antonio Metropolitan Transit Authority, 26 WH Cases 65 (Feb. 19, 1985).

In the 1976 National League of Cities case, the Court had decided that the FLSA could not be applied constitutionally to the "traditional governmental functions" of state and local government. Cases after National League, therefore, centered on whether the state or locally-owned enterprise or department was engaged in what might be termed "traditional governmental functions."

The San Antonio decision is obviously of enormous importance to state colleges and universities and may require a substantial overhaul of their wage and hour policies to bring them into compliance with the Act. These institutions should carefully review, with counsel, not only their compliance with the minimum wage requirements of the Act, but also whether their policies on overtime pay, compensatory time off and record-keeping are adequate under the Act.

In a number of cases, this may also require modifications of existing collective bargaining agreements or at least raise new issues for future negotiations.

A. Exclusivity and the First Amendment

In Minnesota State Board v. Knight, 104 S.Ct. 1058 (1984), the U.S. Supreme Court held that faculty members of the Minnesota Community College system were not deprived of any constitutional rights by a Minnesota statute under which a union as a designated bargaining agent had the exclusive right to "meet and confer" with the Colleges on non-mandatory subjects of bargaining.

The Minnesota Public Employment Labor Relations Act provides that exclusive bargaining agents have the right to "meet and negotiate" over hours of work, compensation and personnel policies affecting working conditions. The bargaining agent of professional employees had the additional right to "meet and confer" with their employees on employment-related matters which are not mandatory subjects of bargaining. The public employer is directed to meet only with such exclusive representatives on these issues.

A group of non-union faculty members challenged these provisions, claiming that the statute, in essence, denied them their First Amendment rights to speak out on these issues as well as their Fourteenth Amendment rights of equal protection.

In rejecting these arguments, Justice O'Connor, writing for the majority, stated that "nothing in the First Amendment or in this Court's case law. . . suggests that the rights to speak associate and petition require government policymakers to listen or respond to individuals' communications on public issues." While the statute does accord a greater voice to the exclusive bargaining agent, there is nothing inappropriate about this: "A person's right to speak is not infringed when government simply ignores that person while listening to others."

With regard to the equal protection argument, the Court held that the state has a legitimate interest in ensuring that public employers hear one voice representing the majority view of its professional employees on employment-related policy questions.

While the decision can rightfully be viewed as a victory for labor unions by the Court's reaffirmance of their exclusive role in employment matters, it can also be seen as an aid to public employers who wish to focus their discussions on such matters with one group. The decision allows an employer to stand firmly behind the doctrine of exclusivity as a means of avoiding a multiplicity of forums where employment-related matters could be discussed on campus.

CAMPUS BARGAINING AND THE LAW: AN UPDATE
B. DISCRIMINATION ISSUES AND THEIR EFFECT ON COLLECTIVE BARGAINING

Stuart H. Bompey, Esq.
Baer, Marks & Upham
New York, New York

INTRODUCTION

Ever since the enactment of the first major federal legislation prohibiting discrimination, the process of collective bargaining has been subject to state and federal antidiscrimination statutes and regulations. Whether the issues are raised as a result of a conflict between provisions of a collective bargaining agreement and the federal or state statutes and interpretations of those statutes, or whether the issue is raised during the collective bargaining process in an effort to remedy past discrimination; negotiators of collective bargaining agreements must be cognizant of the impact of the development of the law in the equal opportunity area when negotiating a collective bargaining agreement. Further, more recently, issues such as comparable worth, affirmative action and age discrimination have been dealt with more effectively during the collective bargaining process than by litigating these issues in federal or state courts. This morning, I hope to give you an update on the current developments involving discrimination issues and their effect on collective bargaining.

AFFIRMATIVE ACTION

Probably the most talked about and controversial issue in 1984 and continuing into 1985, has been the issue of affirmative action. The Reagan Administration's current pronouncements on the possible elimination of goals and timetables and its aggressive approach in attempting to overturn both voluntary and court directed affirmative action plans, which give "preference" to protected groups, has caused great concern and confusion among those individuals who deal with the issue of affirmative action on a daily basis. To properly understand the current issues, one must review what has transpired during the recent past and how these events effect one's ability to voluntarily negotiate affirmative action provisions within a collective bargaining agreement to rectify actual or perceived past discrimination.

In 1979, all of us thought that the Supreme Court of the United States in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), settled the issue as to whether an employer and the union could

voluntarily enter into an affirmative action program which was designed to rectify past discrimination.

Brian Weber, a white male, and unsuccessful candidate for a job training position, challenged the training program plan as being in violation of Title VII of the Civil Rights Act. In approving the affirmative action plan, the Supreme Court held that Title VII does not prohibit private employers and unions from agreeing to the voluntary adoption of a bona fide affirmative action plan aimed at eliminating racial imbalance in traditionally segregated job categories. The Supreme Court observed that the prohibition against racial discrimination in Title VII must be examined in light of the legislative history of the Act and the historical contexts from which it arose. Thus, the Court noted that the primary goal of Title VII was the integration of minorities into the economic mainstream of the American society and that Title VII was not merely intended to be remedial, but was intended to create an atmosphere conducive to voluntary or local resolution of discrimination issues. However, in approving the Kaiser plan, the Supreme Court noted that a voluntary affirmative action plan would only be consistent with Title VII if: (1) it was designed to break down old patterns of racial segregation and hierarchy; (2) it did not unnecessarily trample the interest of white employees; (3) it did not create an absolute bar to the advancement of white employees; and (4) it was a temporary measure not intended to maintain racial balance but simply to eliminate a manifest racial imbalance.

Until recently, parties pursuant to the Weber case have been operating under the assumption that voluntarily established affirmative action programs which met the four criteria of Weber were permissible. However, in June 1984, the Supreme Court handed down its ruling in Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S. Ct. 2576 (1984). In that decision, the Supreme Court placed limits on the availability of race and sex-conscious remedies imposed by the courts. Specifically, the Court ruled that a district court could not unilaterally modify a consent decree that imposed specific across-the-board racial quotas on layoffs conducted pursuant to a bona fide seniority system. The Stotts decision arose as a result of litigation instituted by a class of blacks who were rejected for positions in the Memphis Fire Department. As a result of extensive litigation, the parties entered into a consent decree, which provided for specific quotas on the hiring of minority members into the Fire Department in the city of Memphis. The consent decree was silent regarding what would happen in the event that the city was required to lay off individuals after they were hired. The collective bargaining agreement with Local 1784 and the city of Memphis provided that layoffs would be pursuant to a bona fide seniority system, i.e., last one hired, first one laid off. In 1981, because of financial conditions, the city of Memphis was forced to lay off a substantial number of firefighters within the Local 1784 bargaining unit. In view of the fact that the individuals hired as a result of the consent decree were the last ones hired, pursuant to the bona fide seniority system contained in the collective bargaining agreement between the city and Local 1784, the minority firefighters were the first ones laid off. These individuals then sought modification of the consent decree after their layoffs. The district court modified its original consent decree and indicated that it was inconsistent with the intent of the original decree to force the layoff of the minority hires, which layoffs would defeat the entire purpose of the original decree. Local 1784 then instituted an action to set aside the amendment to the consent decree issued by the district court.

In reviewing the issues, initially, the Supreme Court, relying essentially upon Section 703(h) of Title VII, found that layoffs conducted

pursuant to a bona fide seniority system were valid even if they had the effect of eliminating the effects of the previous court consent decree. However, the importance of the Supreme Court's decision rested not only in its specific ruling limiting Title VII modifications of seniority-based layoffs, but in the Court's broader language which seemed to suggest that race-conscious remedies could not be imposed absent a finding of intentional discrimination. Further, in limiting the role of the courts to modify the terms of consent decrees, the Court also stated that race- and sex-specific remedies could be applied only to identifiable victims of discrimination. This "second" ruling of the Court, which was tangential to the essential issue, suggested to many legal scholars that the Supreme Court had set new limits of the use of race- and sex-specific numerical programs as applied under Title VII and inherent in affirmative action programs. Thus, the Stotts decision was, in effect, two decisions. The first was a straightforward extension of the legal immunity to bona fide seniority plans. The Supreme Court had said earlier that bona fide seniority plans could not be modified unilaterally by the application of Title VII (see Teamsters v. U.S., 431 U.S. 324 (1977)). In the Stotts decision, the Supreme Court completed the scope of that protection by ruling that in the event of layoffs, the terms of a bona fide seniority system overrode any conflict with affirmative action plans. The Supreme Court then went further to discuss what it viewed as the apparent limitations of the lower court's use of numerical remedies where sex or race was a factor. In essence, the Court ruled that where there were no actual identifiable victims of discrimination, a plan containing specific numerical levels of employment attainment for minorities and women in identifiable jobs would be in violation of Title VII of the Civil Rights Act.

However, it appears that the district courts and the United States Circuit Courts of Appeal have been less than enthusiastic in support of the Administration's interpretation of the Stotts decision. In Britton v. South Bend Community School Corp., 593 F. Supp. 1223 (N.D. Ind. 1984), the District Court rejected the argument that an affirmative action plan mutually agreed-upon and incorporated within a collective agreement, which plan provided for goals to hire minority teachers and protection of such new hires from layoff, was impermissible racial classification in violation of the Supreme Court's ruling in Stotts. The Court concluded that the Supreme Court in Stotts did not intend to require that voluntary affirmative action goals may be race- or sex-specific only where actual identifiable victims of discrimination were present. The Court noted that the no-layoff provisions of the collective bargaining agreement to protect minority hires were contained in a collective bargaining agreement approved by the rank and file of the NEA (the collective bargaining agent for the employees involved including some of the plaintiffs) not once but twice. The Court noted that the affirmative action program incorporated in the collective bargaining agreement was based upon a finding by the school board which specifically identified a racial imbalance in its teaching staff and was meant to address that imbalance through an affirmative action program designed to increase the percentage of black teachers on the teaching staff.

In a similar case, the Sixth Circuit Court of Appeals upheld a collective bargaining agreement provision which stated that "at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff". Thus, in Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 53 U.S.L.W. 3739 (1985), the Sixth Circuit found that the layoff protection clause contained in the collective bargaining agreement was a voluntary affirmative action program designed to correct past racial imbalances in the composition of the teaching staff within the Jackson Board's jurisdiction. The Court

found that rather than being prohibited under the Supreme Court's decision in Stotts, the program involved a voluntary affirmative action plan contemplated by the Supreme Court earlier in the Weber decision. The Sixth Circuit, like the District Court in Britton, found that the Supreme Court's decision in Stotts was not meant to prohibit voluntary affirmative action plan provisions which included specific racial classifications.

More recently, the United States District Court for the District of Columbia in Hammon v. Berry, 37 FEP Cases 609 (D.D.C. 1985), in rejecting the argument made by the government that the Supreme Court's decision in Stotts precludes the use of any race-conscious affirmative action plan, found, however, that a race-conscious affirmative action plan that seeks to remedy past discrimination must meet the test established in the Weber case. Further, the Court noted that prior to implementing such a plan, the parties must explore the various alternatives available to remedy the past discrimination and must select that alternative which has the least impact on the innocent non-minority employees. Other cases that are worthy of note since the Stotts decision include Detroit Police Officers Association v. Young, 36 FEP Cases 1019 (E.D. Mich. 1985), Janowiak v. City of South Bend, 750 F.2d 557 (7th Cir. 1984), Vanguards v. Cleveland 753 F.2d 479 (6th Cir. 1985), Bushey v. New York State's Civil Service Commission, 733 F.2d 220 (2d Cir. 1984), cert. denied, 105 S. Ct. 803 (1985) and EEOC v. Local 638, 753 F.2d 1172 (2d Cir. 1985).

Considering the current state of the law in this area, it is difficult to give guidance to those who are faced with negotiating affirmative action relief during the collective bargaining process. However, it is suggested that if one meets the criteria established by the Supreme Court in the Weber case, collectively bargained affirmative action programs would be permissible even under the Stotts decision. It is also suggested that in negotiating such plans, the parties should specifically set forth the basis for which the affirmative action obligations are being imposed and the limits on the affirmative action relief. In addition, it would be helpful if the parties incorporated in the memorandum of understanding the alternatives explored and the effect that the various alternatives would have on the so-called innocent non-minority employees. Hopefully, within the near future, the Supreme Court will deal with the issue of voluntary affirmative action programs and clarify the apparent conflict that exists between the courts and the approach of the Reagan Administration in this area.

CONFLICTS BETWEEN AFFIRMATIVE ACTION PLANS AND COLLECTIVE BARGAINING AGREEMENT PROVISIONS

Another related issue is the conflict between the requirements of an affirmative action program or a conciliation agreement and provisions of a collective bargaining agreement. Thus, oftentimes employers enter into conciliation agreements with the Equal Employment Opportunity Commission or with the Office of Federal Contract Compliance Programs which, in application, tend to conflict with specific provisions of their collective bargaining agreements. When such a conflict arises should the "law of the contract" or the federal law promoting the elimination of past discrimination prevail?

The Supreme Court in W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983), attempted to resolve this issue. In the W.R. Grace decision, after finding that W.R. Grace violated Title VII of the Civil Rights Act, W.R. Grace and the Equal Employment Opportunity Commission entered into a conciliation agreement. The agreement provided that the company would not enforce the seniority system mandated by its collective bargaining

agreement, which enforcement the EEOC had found perpetuated the effects of the company's past discrimination. Significantly, the union involved was invited to participate in the conciliation process, but declined to do so. Because of a conflict of court and arbitration decisions, one requiring the company to abide by the collective bargaining agreement and the other requiring the company to abide by the conciliation agreement, the Supreme Court was asked to reconcile the policy considerations in voluntary compliance under Title VII with the policy considerations involved in the sanctity of the collective bargaining agreement.

In attempting to resolve this conflict, the Supreme Court first noted that the collective bargaining agreement, as with any other contract, would not be enforced if it was contrary to public policy. However, it found that the collective bargaining agreement and the seniority provisions themselves were not contrary to public policy. Rather, it found that the dilemma that W.R. Grace was presented with was of their own making. The Court found that W.R. Grace committed itself voluntarily to two conflicting contractual obligations. Thus, when the union attempted to enforce its contractual rights, the company sought a judicial declaration of its respective obligations under the collective bargaining agreement and the conciliation agreement. During the course of this litigation, before its legal rights were finally determined, the company decided to breach its contract with the union. For these acts, the company incurred liability for a breach of the collective bargaining agreement. In finding that the provisions of the collective bargaining agreement must prevail, the Supreme Court found that absent a judicial determination, the Equal Employment Opportunity Commission, not to mention W.R. Grace, could not alter the collective bargaining agreement without the union's consent. The Court noted that to permit a contrary result would undermine federal labor policy.

Thus, the Supreme Court in W.R. Grace, instructed that a conciliation agreement is specifically enforceable so long as regular contract rules are satisfied and enforcement of that agreement does not conflict with the parties' individual rights. A court cannot order a party to perform promises made in a conciliation agreement or an affirmative action program where such promises conflict with the party's collective bargaining agreement without the union's consent, absent an independent finding of discrimination. Subsequent to the Grace decision, the Fifth Circuit Court of Appeals in EEOC v. Safeway Stores, Inc., 714 F.2d 567 (5th Cir. 1983), cert. denied, _____ U.S. ___, 104 S. Ct. 2384 (1984), consistent with the Grace decision, noted that affirmative action relief could not be ordered over the union's objections where the union had no opportunity to participate in an adjudication that a Title VII violation had occurred.

In sum, under the principles of Grace, a conciliation agreement entered into by an employer and the EEOC pursuant to a Title VII charge, or for that matter, between the employer and the OFCCP pursuant to Executive Order 11246, cannot alter the terms of the collective bargaining agreement absent the union's consent or an adjudication on the merits that a violation of either Title VII or the Executive Order had occurred. Therefore, where employers are presented with such agreements that alter specific provisions of a collective bargaining agreement and where the union involved is reluctant to join in the conciliation process, it is suggested that a proceeding be brought in an attempt to force the union to intervene into the process. Finally, an employer may have to risk the possibility of the institution of a lawsuit by the Equal Employment Opportunity Commission enjoining both the employer and the union, rather than risk the possibility of entering into an agreement which directly conflicts with the collective bargaining

agreement.

COMPARABLE OR PAY EQUITY

No issue has raised more of a furor among predominantly women's groups in the 1980's than the issue of comparable worth or pay equity. Significantly, a review of the recent court decisions indicates that the issue of comparable worth will shift from the courthouses to the collective bargaining arena in 1985 and beyond. One must only look to the recently concluded negotiations at Yale University and the issues raised during the current negotiations involving the New York State higher education system, to determine the impact that this issue will have in collective bargaining during this year and for the remainder of the century. It is submitted that the issue has moved to the collective bargaining table because of a lack of acceptance by the Federal Courts of the comparable worth theory.

Comparable worth in its purest sense is based upon a theory that wages for a job should be based on the job's value to an organization absent all other factors. The Supreme Court of the United States in County of Washington v. Gunther, 452 U.S. 161 (1981), recognizes the right of individuals to institute wage-based sex discrimination litigation under Title VII, where jobs were not of equal value and such litigation was not recognized under the Equal Pay Act. However, the decision in Gunther has been limited in application to findings of intentional discrimination and, for the most part, the courts have not adopted comparable worth as a viable theory of sex discrimination. The more recent decisions in AFSCME v. State of Washington, 578 F. Supp. 846 (D.C. Wash. 1983) and Spaulding v. University of Washington, 740 F.2d 686, cert. denied, ___ U.S. __, 105 S. Ct. 511 (9th Cir. 1984), both have indicated that absent evidence of intentional discrimination, the courts will not adopt a comparable worth theory. Significantly, the Ninth Circuit in Spaulding v. University of Washington, recognized the ability of the University to determine salaries, in part, on competitive market pricing. Similar decisions of note include Connecticut Employees Association v. State of Connecticut, 31 FEP Cases 191 (D. Conn. 1983), Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983), Christenson v. State of Iowa, 563 F.2d 353 (8th Cir. 1977). Finally, the District Court's decision for the Northern District of Illinois, on April 4, 1985, appears to put yet another nail in the coffin of comparable worth as a viable issue before the Federal Courts.

On April 4, 1985, the United States District Court for the Northern District of Illinois, Eastern Division, in American Nurses Association v. State of Illinois, 37 FEP Cases 705 (N.D. Ill. 1985), specifically held that the Court was unwilling to expand the limits of Title VII to encompass a comparable worth claim.

Finding that a comparable worth case is not recognizable under Title VII, the Court noted that in deciding a comparable worth claim, a court would be compelled to either evaluate the validity of the job evaluation system used by an employer, including any external factors, and then impose a particular wage system on the employer or, in the absence of such a system, to determine the relative worth of the job in question by comparison of it to other jobs in the employer's establishment. The Court stated that nothing in the law obligates an employer to adopt a new pay structure simply because a particular evaluative study indicates that a different set of pay relationships would be more equitable. The Court noted that such a rule would create a disincentive to employers to conduct job evaluation studies at all. What the law does require, the Court stated, is equal application of the particular wage system adopted by the employer. In concluding that the

failure of the state to take any action as a result of the study was not in violation of Title VII or probative evidence, the Court noted:

> such an effect would also result if the court adopted plaintiff's second argument for why the results of the study constitute probative evidence of discrimination, e.g., that the state's failure to take corrective action to implement the findings of the study, supports the finding of unlawful discrimination. Job evaluations can be a useful diagnostic tool, but the law does not require an employer to implement immediately whatever pay changes a particular study suggests, without regard to economic considerations, the labor market, bargaining demands or the possibility that some other study might produce different results.

A review of the decisions on comparable worth, including the latest pronouncement of the United States District Court for the Northern District of Illinois, Eastern Division, in the State of Illinois case, clearly indicates that the battle on comparable worth will shift to the bargaining table and union organizing. Many unions, including AFSCME, District 925, SEIU, CWA and the IUE promote comparable worth both in the collective bargaining process and in attempts to organize predominantly female employees. Faced with these challenges, it is essential that in adopting job evaluation or pay systems, specific criteria for establishing job rights be instituted, job descriptions be fully documented and specific, and internal procedures be established in determining the adverse impact on groups affected by the system. Further, pay systems or job evaluation systems should be reevaluated on a periodic basis, no less than every three years, to determine their effectiveness and whether the criteria established for the system are still being applied. Market pricing for positions may still be used provided that the employer is consistent in its application of the market pricing criteria.

Should a college or university be faced with the issue in collective bargaining by way of a demand to set aside funds to eliminate pay inequities based upon a finding or a perception of past discrimination, like affirmative action, the college or university must be mindful of the potential reverse discrimination effect of such programs. However, recently, the Seventh Circuit Court of Appeals in Ende v. Board of Regents, 37 FEP Cases 575 (7th Cir. 1985), found that the implementation of a wage adjustment to restore victims of past discrimination to salary levels they would have enjoyed in the absence of discrimination, did not constitute so-called reverse discrimination when the male faculty members were not given similar adjustments. It is significant to note, however, that the Court found that the statistical study, which formed the basis of the wage adjustments, demonstrated that salaries paid to female faculty members were lower than those paid to comparable male faculty members based on past discrimination and that the adjustment formula eliminated this "sex-based" differential.

Finally, as seen by the Yale strike, the political ramifications attendant to the issue of comparable worth or pay equity will present the largest challenge on the college campuses in 1985 and beyond.

TENURE DECISIONS

Historically, the courts and administrative agencies have been reluctant to interfere with the decision of a college or university to grant or deny tenure. Thus, the courts have historically taken the position that the academic judgments of the college or university should not be disturbed and, even in the most outrageous circumstances, the courts would merely order a resubmission of the candidate's application for tenure through the appropriate procedures. Recently, the Second Circuit Court of Appeals in Zahorik v. Cornell University, 729 F.2d 85 (1984), in refusing to disturb the tenure decisions of Cornell and indicated the burden be placed upon a plaintiff in a tenure denial case. The Court explained that:

> the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or the university. Absent evidence to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their department faculties or reviewing authorities.

In the Cornell case, the Court, in granting summary judgment for the university, noted that there were a variety of factors which tended to set tenure decisions apart from employment decisions in general. The 1984 decision of the United States District Court for the District of Massachusetts in EEOC v. Boston University, 35 FEP Cases 708 (1984), is also worthy of note, wherein the District Court arrived at the same conclusion as the Second Circuit in the Cornell decision. (See also O'Connor v. Peru State College, 728 F.2d 1001 (8th Cir. 1984), wherein the court discusses the standards for injunctive relief in a denial of tenure case).

Although, as noted, the courts have been reluctant to grant tenure in employment discrimination cases, two decisions questioning the court's general approach in this area should be noted. In PYO v. Stockton State College, 37 FEP Cases 493 (D.N.J. 1985), the Federal District Court for New Jersey was presented with a claim that a denial of tenure was a product of sex and/or race discrimination. The relief sought by the plaintiff was a judicial award of tenure. The college moved for partial summary judgment, seeking an order striking a judicial award of tenure as a possible remedy in this case. The college's position was that even if the tenured decision was a product of discrimination, a judicial award of tenure under the undisputed facts of this case was inappropriate. The college argued that the appropriate remedy for discrimination would be to remand the tenure application to the college for a review of the decision. In deciding the issue, the Court noted that Title VII clearly applied to hiring and employment policies and decisions of colleges and universities, including a decision to grant or deny tenure. The court noted that since the essential purpose of Title VII was to make persons whole for the harm suffered on account of unlawful employment discrimination, a judicial award of tenure may, under appropriate circumstances, be warranted. The Court, however, noted that other courts have struggled with the application of Title VII to the academic

setting and more often than not have undertaken no more than a deferential review of tenured decisions in contrast to the rather aggressive review taken in employment decisions involving blue-collar workers. The Court concludes its analysis by finding that where a candidate's qualifications are undisputed and discrimination is the apparent reason that tenure was denied, the Court may award tenure, but where the issues are in doubt, the Courts generally should not conduct their own evaluation. Further, the Court notes that where the plaintiff can demonstrate that others with the same or very similar evaluations or qualifications were granted tenure, it may be appropriate for the Court to grant the plaintiff tenure. Finally, the Court denies the motion for summary judgment pending a determination as to the evidence on the issue of discrimination. The Stockton State College case again points up the difficulty the courts have with the issue and the analysis of the District Court should be reviewed when dealing with this subject. (See also Kumar v. Board of Trustees of the University of Massachusetts, 34 FEP Cases 1231 (D. Mass. 1984)).

THE EFFECT OF PRIOR DETERMINATIONS

As plaintiffs tend to litigate similar issues in multiple forms, the binding effect of prior rulings must be brought into focus. Whether a plaintiff is alleging employment discrimination in an unemployment compensation hearing or before an arbitrator, one must determine if an adverse ruling to the plaintiff can be used in a subsequent proceeding under a state or federal antidiscrimination statute. Of course, the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), aff'd, 519 F.2d 503 (10th Cir. 1975), cert. denied, 423 U.S. 1058 (1976), severely limited the application of a prior adverse arbitration award under a collective bargaining agreement on the right of an individual to institute a subsequent Title VII action. In that case, the Court emphasized that Congress intended a scheme of overlapping, independent, and supplementary discrimination remedies. Similarly, in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Supreme Court held that Title VII and 42 U.S.C. §1981, although related and directed to most of the same ends, provide separate, distinct and independent discrimination remedies. In McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973), aff'd, 528 F.2d 1102 (8th Cir. 1976), the Court permitted a plaintiff to bring suit in federal court, notwithstanding an EEOC determination of no probable cause. Finally, in Chandler v. Roudebush, 425 U.S. 840 (1976), the Court permitted a federal employee to bring a Title VII suit, even though the Civil Service Commission had affirmed a federal agency's rejection of the employee's discrimination claim.

In all of these cases, the Court refused to close the doors to the federal courthouse to Title VII plaintiffs. Rather, the Court allowed the Title VII plaintiffs to institute an action in federal courts although they had failed before the EEOC, an arbitrator and/or a federal agency. However, in Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), the Supreme Court found that where an individual chooses to litigate before a state administrative agency, and is given a full and fair opportunity to litigate the merits of his or her employment discrimination claim, the decision of the state courts are entitled to full faith and credit in a subsequent Title VII action.

More recently, in Buckhalter v. Pepsi-Cola General Bottlers, Inc., 590 F. Supp. 1146 (N.D. Ill. 1984), the District Court, in applying the doctrine of res judicata, as announced by the Supreme Court in the Kremer case, found that the doctrine precluded a former employee from bringing an action under 14 U.S.C. §1981 and Title VII following an adverse decision by a state FEP agency, acting in its judicial and not just administrative or investigative capacity. Significantly, the state

agency involved conducted a four-day hearing during which witnesses were examined and cross-examined under oath, the plaintiff exercised his right to subpeona evidence, both parties were permitted to make evidentiary objections during the hearing, and the administrative law judge's unfavorable ruling was appealed within the agency and finally reviewed by a state court. In arriving at its conclusion, the Court noted that the plaintiff was afforded sufficient due process in the litigation of his administrative claim and, therefore, the Court concluded that a federal court may give a state administrative proceeding binding effect if such proceeding satisfies the applicable requirements of due process.

Ross v. Communications Satellite Corp., 34 FEP Cases 280 (1984), underscores the importance of litigating issues before a state unemployment compensation board where discrimination action is contemplated or threatened. Thus, the United States District Court of the District of Maryland in Ross, ruled that the findings of the Maryland Employment Security Administration, that a former employee was discharged because of misconduct and not because of discrimination or retaliation, must be given binding effect in a subsequent Title VII action. Significantly, in the administrative proceedings, the plaintiff contended that his discharge was discriminatory and retaliatory and that he was, therefore, entitled to unemployment benefits. In Ross, there was no question that the issue of discrimination raised under Title VII was fully litigated before the Maryland Employment Security Administration. See also Ryan v. New York Telephone Company, 62 N.Y.2d 494 (1984), in which the Court of Appeals affirmed the New York rule that the doctrines res judicata and collateral estoppel are applicable, giving conclusive effect to judicial determinations of administrative agencies, provided that the administrative hearing was a full and fair one and followed procedures substantially similar to those in court. In the Ryan case, the Court held that the Department of Labor's decision that the plaintiff was terminated for misconduct, after a hearing in which the employee sought unemployment insurance benefits, was binding on a subsequent court action by the same employee. Finally, Perez v. State of Maine, 585 F. Supp. 1535 (D. Maine 1984), the United States District Court for the District of Maine dismissed a Title VII suit filed by an employee who had signed a conciliation agreement settling a state fair employment practices charge. The Court found that the conciliation agreements settling the state claim waived the individual's right to sue under Title VII.

These decisions point out the significance of raising discrimination issues at the earliest possible stage in order to preclude further litigation in a variety of forms. Provided that the plaintiff is given a full and complete hearing on the issues involved at the initial proceeding, the defendant may be able to plead a favorable determination in a subsequent suit under Title VII or under a state fair employment practices statute.

CONCLUSION

An analysis of the foregoing clearly establishes the significance and the impact of employment litigation issues on the collective bargaining process. Not only should the negotiator review existing collective bargaining agreements and the impact of recent decisions on existing provisions, but the negotiator must be mindful of these decisions when negotiating subsequent agreements. Federal and state antidiscrimination statutes affect every employment decision made by a college and university and have become essential ingredients in the collective bargaining process.

CAMPUS BARGAINING AND THE LAW: AN UPDATE
C. LABOR LAW AND THE QUESTION OF TRADITIONAL GOVERNMENT FUNCTIONS

David E. Poisson, Esq.
Coordinator of Higher Education
National Education Association

INTRODUCTION

When Joel called and asked me to participate in this discussion with the likes of such accomplished legal practitioners as those with whom I am sharing this platform today, I was at once reminded of Learned Hand's dream day. Judge Hand said, "It would begin with a wonderful hunt breakfast." I've never hunted, but I'd love one of those breakfasts. "In the afternoon, I'd captain the football team and make the winning play." I've never played football. "And in the evening there would be an exquisite banquet with civilization's greatest conversationalists — you know, Socrates, Voltaire, Sartre, and others of their ilk. And after wonderful wine and glorious conversation, someone would stand up and shout, 'Shut up, Voltaire! I want to hear Learned Hand.'"

Now I don't pretend to be a Learned Hand, not by a very long shot. But I do have a proper sense of my place in the company of such persons as Messrs. DiGiovanni and Bompey and Ms. Barrett. And so in my remarks this morning, I will limit myself to speaking to three issues only lightly touched upon by the preceding speakers — agency shop, the relationship of affirmative action and seniority, and what, if anything, Garcia v. San Antonio Metropolitan Transit Authority portends for the future of public sector collective bargaining — all of which are, in my view, terribly important to the future of academic collective bargaining. More specifically, I will discuss the Supreme Court's April 25, 1984 decision in Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Firefighters Local Union No. 1784 v. Stotts and Garcia, but not for what it may mean in terms of the application of minimum wage-maximum hour provisions to colleges and universities, but rather to the possibility it has resurrected of gaining passage of a federal collective bargaining statute for public employees.

AGENCY SHOP

A. Aboud v. Detroit Board of Education

Let me begin with agency shop. As I assume all of you know, agency shop is an arrangement designed to eliminate what is known as

"free riders". Employees in a bargaining unit are not required to join the recognized organization. But if they choose not to join, they must pay a fee to that organization to offset their per capita share of the expense of representing them. The United States Supreme Court first addressed the constitutionality of agency shop in the public sector in a 1977 decision called Aboud v. Detroit Board of Education. The basic issue in the Aboud case was whether an agency shop arrangement, negotiated between the Detroit Federation of Teachers and the Detroit Board of Education pursuant to a Michigan statute, was constitutional, or whether it violated the First Amendment rights of those non-members who objected to the payment. Although the Supreme Court recognized that agency shop might indeed interfere with the First Amendment right of free association of those who chose not to associate themselves with the recognized union, the Court nonetheless held that the agency shop was justified, finding that whatever interference there may have been with the plaintiffs' First Amendment rights was justified by the legitimate and important state interest in peaceful and stable labor relations, which was the result of the elimination of "free riders". The Court, in effect, concluded that agency shop is as legitimate and appropriate in the public sector as it is in the private sector and, therefore, it sustained the concept of agency shop.

B. Unconstitutional and Unrelated Expenditures

Aboud involved a second issue. In addition to challenging the basic concept of agency shop, the plaintiffs objected to certain specific uses to which the union had been putting their money. They said they were willing to pay to be represented at the bargaining table, but there were certain other things the Detroit Federation of Teachers was doing with their money to which they objected and for which, therefore, they felt they ought not to have to pay.

The Supreme Court found merit in that argument. It said that the fees that are collected — compulsory fees — over the objection of non-members may not be used for just any purpose. The purposes must be limited to what the Court referred as as "expenditures that are related to collective bargaining, contract administration, and grievance processing". The Court went on to say that the use of compelled money for other purposes would indeed constitute an impermissible violation of the First Amendment rights of the objecting employees.

Unfortunately, the Supreme Court in Aboud made no effort to draw that line. It provided no guidance for us as to what is a "related expense" as opposed to an "unrelated expense". And since 1977, a good many of us have been involved in burdensome, expensive, and time-consuming litigation in an effort to determine for what purposes a dissenting fee-payer's money may be used. What expenditures are permissible, and which are impermissible, and as to which must we return some money? The decisions of the lower courts show virtually no consistency, and we have had for the last seven years the proverbial legal "swamp".

C. Ellis v. Brotherhood of Railway, Airlines and Steamship Clerks

The Supreme Court of the United States provided no guidance to us from 1977 until last year, when it decided the case of Ellis v. Railway Clerks. Although Ellis is a private sector case involving agency shop under the Railway Labor Act, the Supreme Court did address certain of the constitutional questions left open in Aboud and, accordingly, the decision provides guidance and gives us some insight into what we can and cannot do with agency shop in the public sector.

Ellis involved a challenge by dissenting agency fee-payers to five expenditures that were made with their dues. Those expenditures were for the following purposes: union conventions, union social activities, publications, organizing activities, and litigation. The National Right to Work Committee, which represented the plaintiffs in the Ellis case, contended that none of those functions should be chargeable to objecting fee-payers. The Right to Work Committee urged a narrow definition. It said that, consistent with the theory of agency shop, the union should be allowed to charge only for expenses that are directly and intimately related to collective bargaining, contract administration, and grievance processing — in essence, to what takes place directly at the bargaining table. These expenses would include the costs of dealing across the table, the processing of grievances, and arbitration hearings.

D. The Ellis Test

The Supreme Court rejected that narrow construction, and it held instead that the union may expend compelled fees for "any purpose reasonably or necessarily incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues." The Supreme Court then took that general standard and applied it to the five specific expenditures that were challenged in the case before it.

1. Turning first to union conventions, the Court held that those may indeed be charged to dissenting fee-payers. The Court stated that a union convention "guides the union's approach to collective bargaining and the expenses of running it are directly related to the union's effectiveness in negotiating labor agreements".

2. The Court held that social activities are likewise chargeable. While recognizing that social activities are not central to collective bargaining, the Court stated that "these activities do enhance relationships among bargaining unit members, and therefore, allow for a more effective operation of the union".

3. Publications are also a chargeable expense, said the Court. They further worker education and are a reasonable way of reporting to constituents on union activities. But, here the Court drew a line. It said that not all publication expenses may be charged. You may charge a dissenting fee-payer for the cost of publishing and broadcasting about activities for which you might otherwise charge, but not for the cost of a publication that deals with activities which are themselves non-chargeable. For example, an article or a magazine that talked about your union's endorsement of a political candidate, since the activity itself would not be chargeable, that amount of money spent in a newspaper or magazine to report on it would likewise not be chargeable.

4. The Court concluded organizing expenses may not be charged. It said they are not directed to the employees in the bargaining unit; they are directed to employees outside the bargaining unit and have "only the most attenuated benefits" to the dissenting agency fee-payers. But, in my view, and in the view of many of my colleagues on union legal staffs, what the Court meant here when it talked about organizing was organizing in its truest and purest sense — in other words, expanding our bargaining units, or seeking to represent units on campuses where we do not now have them. The exclusion would not encompass what we refer to as membership maintenance, the money we spend every fall to keep our present membership and to re-sign members from the prior year. It is our belief that these organizing expenses are chargeable and, therefore, should be included in the agency fee.

5. Finally, the Court turned to litigation. It said expenses for litigation which relate directly to this bargaining unit, to negotiating this contract, to administering it, to defending the members in this bargaining unit, those expenses are chargeable. But litigation expenses that have no direct impact on the employees in the bargaining unit may not be charged to dissenters. Although the Court did not establish a bright line between chargeable and non-chargeable expenses, and although its reasoning is not entirely consistent, at least the Court gave us some guidelines, which can be developed and elaborated upon by the lower courts.

In the first major federal decision since the Ellis case was decided, the Third Circuit Court of Appeals held that objecting fee-payers in New Jersey may be charged for the cost of lobbying activities undertaken by the New Jersey Education Association (NJEA) in order to improve, through statutory change, pension benefits and other working conditions.

In an amazing display of wishful thinking, the National Right to Work Committee has characterized Ellis as a major setback for public sector agency shop. It is hardly that. It has some positive aspects, and it has some negative aspects. It is not as expansive as some of us in labor had hoped it would be, but neither is it as restrictive as we had feared it might be. It is certainly a liveable result.

AFFIRMATIVE ACTION AND SENIORITY

The relationship between affirmative action and seniority has been a source of considerable controversy at least since the Supreme Court decided the Weber case in 1979. Weber was a private sector case involving preferential treatment for minorities in a job training program at a Kaiser Aluminum plant in Louisiana. A more senior white employee, who had been passed over, challenged the program alleging that it involved illegal reverse discrimination under Title VII of the 1964 Civil Rights Act. The Supreme Court rejected that challenge, upheld the program, and decided that it did not constitute unlawful reverse discrimination.

The Weber decision was, in 1979, a major boost for those who believe in the concept of affirmative action. The controversy really heated up, however, in 1983 when the United States Supreme Court agreed to hear a case involving the layoff of police and firefighters in Boston, Massachusetts. The issue was whether a lower court order that protected less senior employees from layoff in the face of a bona fide seniority system constituted impermissible reverse discrimination in violation of either Title VII of the Civil Rights Act or the Fourteenth Amendment to the Constitution. The AFL-CIO and most other unions said it did, that this was impermissible reverse discrimination. NEA disagreed and so filed a brief with the United States Supreme Court in support of affirmative action and the less senior minority employees.

While the case was pending, Massachusetts passed a law rehiring all of the laid off white employees. As a result, the Supreme Court dismissed the case as moot without ever deciding the issue on its merits. The Court did, however, reach the issue a year later.

A. Firefighters Local Union No. 1784 v. Stotts

In June 1984, the Court decided Firefighters Local Union No. 1784 v. Stotts. The Stotts case was a class action brought in federal district court in Memphis, Tennessee, in 1977 on behalf of blacks employed by the Memphis Fire Department. The complaint alleged that the Fire

Department had engaged in unlawful racial discrimination in hiring and promotion in violation of Title VII. The case, however was never tried.

In 1977, the parties entered into a consent decree, under which the Fire Department agreed it would engage in affirmative action in hiring and promotion in order to bring the percentage of blacks in the Fire Department more in line with the percentage of blacks in the relevant labor market. The consent order made no mention of what would happen in the event layoffs became necessary.

Between 1977 and 1981, considerable progress was made in Memphis. The percentage of blacks in the Fire Department increased substantially and was beginning to approach the percentage in the relevant labor market. In 1981, however, the City of Memphis was faced with a budget crisis, and the Fire Department announced that it was going to lay off employees. It announced further that it was going to do so on a strict seniority basis — that is, last in, first out.

If the Fire Department had utilized that approach, it would have effectively undone most of the progress that had been made in achieving racial balance over the preceding four years. Accordingly, the plaintiffs went back to the federal court in Memphis and asked the court for an order that would prohibit the Fire Department from laying off any black employees if laying off those blacks would cause their percentage in the workforce to drop below what it was prior to the layoffs.

The district court entered such an order. As a result, the Fire Department laid off several white employees who had substantially more seniority than blacks who were retained. Moreover, the blacks who were retained were not themselves the victims of the unlawful discrimination; most had been hired after 1977 when the discriminatory practices originally complained of had ended. The Fire Department and the Firefighters Union appealed the district court's order to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the lower court's decision, and the United States Supreme Court then agreed to hear the case.

On June 12, 1984, the Supreme Court issued its decision. It reversed the lower court. It struck down the affirmative action order issued by the lower court as a form of reverse discrimination prohibited by Title VII of the Civil Rights Act.

Stotts was a 6-3 decision and, at the time it was decided, Attorney General William French Smith and several other members of the Reagan Administration characterized the case as the virtual death knell of affirmative action in employment. Indeed, many media reports took a similar position regarding the impact of the case. This is in all probability an overstatement of what the Supreme Court did in Stotts. Certainly, this is not a good case for those of us who believe in affirmative action. And indeed, it may well contain a message as to where this particular Supreme Court proposes to go in regard to the question of affirmative action. But the particular case should not itself be read too broadly. As was said earlier, it should be limited in its interpretation to its facts.

What this case involved was an interpretation of Title VII of the 1964 Civil Rights Act. The case holds that when an employer is guilty of unlawful racial discrimination under Title VII, a federal court, as a remedy for that discrimination, may not impose racial preferences that override a bona fide seniority sysem and that give a preference to minorities who were not themselves victims of the discrimination.

B. Stotts: The Unanswered Questions

This is a significant limitation on the remedial power of a court dealing with racial discrimination under Title VII. There is no doubt about that. But it leaves open three important questions that were not addressed by the Court.

1. First, the case focuses on the relationship between seniority and layoffs, and it is not clear whether a court could issue this type of order if it were dealing with hiring and promotion as opposed to layoffs. When layoffs are involved, someone loses a job. And in earlier cases, the Supreme Court has indicated that one of the factors to be considered in attempting to remedy past discrimination is the extent to which the remedy infringes on the rights of white employees. Nothing infringes more than losing one's job, so a layoff remedy of this type will not survive a Title VII challenge. However, it is an open question whether a court can order this type of preferential treatment in hiring and promotion, but it will probably not remain open very much longer.

2. Second, Stotts may be viewed as a Title VII case, holding only that this kind of remedy may not be used for a violation of Title VII. It does not indicate what type of remedies may be imposed if, as is often the case with faculty and other public employees, there is a constitutional violation. What if we were to allege the discrimination against blacks or against women was not a violation merely of Title VII but violated the Equal Protection Clause of the Fourteenth Amendment as well? It is unclear, from this case at least, what a court can and cannot do to cure that type of discrimination.

3. And finally, the Supreme Court in Stotts spoke only about a court-imposed remedy. It leaves entirely open the question of whether a union and an employer could, through collective bargaining, agree to precisely the type of arrangement that the court was prohibited from imposing in this case. For example, could a white faculty member successfully challenge a provision in a collective bargaining agreement which gives racial preference to minorities in the event of a layoff? Since the provision in the collective bargaining agreement would have been the result of a voluntary agreement between the union and the employer, it is not covered by Stotts. The answer is, it may or may not be unlawful. We don't know. But it is not made unlawful by what the Supreme Court said in Stotts.

I should note that several lower courts since Stotts was issued have sustained voluntary affirmative action arrangements in collective bargaining agreements. In Wygant v. Jackson, Michigan, Board of Education, which was decided last October, some three months after Stotts, the Sixth Circuit held that an affirmative action provision in a collective bargaining agreement between the Jackson, Michigan, Board of Education and the Jackson Education Association, an affirmative action provision which provided racial preferences for hiring, promotion, and layoff was valid. In upholding this provision of the agreement, the court found that:

> The affirmative action plan involved in our case was not the product of any court order. It resulted from voluntary decisions in the collective bargaining process between the school board and the bargaining agent for the teachers. We do not read Stotts as barring this form of affirmative action.

Put simply, if the Supreme Court of the United States intends to restrict severely the use of affirmative action, it will have to say so much more clearly than it did in the Stotts case. Most of the post-Stotts decisions by the lower federal courts have chosen not to read it as a broad condemnation of affirmative action, but rather as a narrow decision giving credence and sustenance to seniority systems but allowing considerable leeway for the negotiation and implementation of affirmative action.

FEDERAL COLLECTIVE BARGAINING LEGISLATION

A. Garcia v. San Antonio Metropolitan Transit Authority

Let me turn finally to the Garcia case and what it may mean in terms of a federal collective bargaining statute for public employees. Because of doubts as to the constitutional authority of Congress to regulate the employment relationship of state and local government employees, the initial efforts of most public sector unions to secure collective bargaining enabling legislation were directed entirely at the state level. We worked only in the state legislatures in the early years. That focus changed in 1968 when the United States Supreme Court decided Maryland v. Wirtz. In the Wirtz case, the Supreme Court sustained the extension, in 1966, of the minimum wage and maximum hour provisions of the Fair Labor Standards Act to state and local government employees as a legitimate exercise of the commerce power of Congress. Although the case did not itself deal with collective bargaining, the premise was there. If Congress had the power, under the Commerce Clause, to tell state and local governments what they must pay to their employees as minimum wages and what they must pay to their employees as overtime, it seems that Congress also had the power to say to state and local governments, "You must sit down and you must bargain with the union that represents your employees."

Accordingly, after 1968, public sector unions focused on Congress as well as on the state legislatures. Between 1968 and 1976, numerous bills for a federal statute were introduced before Congress. Extensive hearings were held during this period. There were arguments for a federal collective bargaining bill, and there were arguments against it. But there seemed to be no apparent dispute as to the constitutional authority of Congress to act, if it chose to do so.

The dispute was a political one. Surely Congress had the power, but would Congress exercise that power? NEA and other public employee organizations lobbied actively to see what we could get through Congress over that period of time. This activity came to a screeching halt in 1976, however, when the Supreme Court decided National League of Cities v. Usery.

B. National League of Cities v. Usery

In National League of Cities, the Court expressly overruled its earlier decision in Maryland v. Wirtz. It held that Congress had exceeded its power under the Commerce Clause when, in 1974, it extended the minimum wage and maximum hour provisions of the Fair Labor Standards Act to several million previously uncovered state and local government employees. The Court said Congress had invaded the "traditional functions" of state governments, that the decision of Congress to act had threatened the integrity of our federal system of government and was a violation of the Tenth Amendment to the United States Constitution. It struck down the congressional action.

National League of Cities was decided by a 5-4 vote of the Supreme Court. The decision was written by Justice Rehnquist, who was joined by Justices Burger, Stewart, and Powell. The necessary fifth vote came from a reluctant Justice Blackmun who, concurring in a separate opinion, said, "I am not troubled by certain implications of the Court's opinion but believe the result is necessarily right in this context."

Although the Court's opinion did not refer specifically to collective bargaining, one did not have to be omniscient to recognize its ramifications in that regard. What the Court did was to revise the basic principle of the relationship between the federal government and the state and local governments in terms of who governed the relationship between public employees and the state and local jurisdictions for which they worked.

The proponents of a federal collective bargaining statute greeted National League of Cities with predictable dismay. And some went so far as to suggest that it ruled out any possibility of meaningful federal action in the area. But, as time wore on, Justice Blackmun, who was the reluctant swing vote in National League of Cities, repeatedly demonstrated his discomfort with the position he had taken. He had ruled against states' rights in a number of cases challenging the power of Congress since 1976. But, he had always done so by distinguishing the case before him from National League of Cities. He had always said National League of Cities can stand because this or that case is different for the following reasons. Whether these cases were actually different or not, I'm not really sure, but the opinions always said they were.

C. Garcia: Traditional Government Functions

In Garcia, Blackmun finally stopped playing that game. He abandoned completely the position he had taken eight or nine years earlier in National League of Cities, and he wrote the opinion for a new majority consisting of Brennan, White, Marshall, and Stevens. Dissenting were Rehnquist, who wrote National League of Cities, Burger, Powell, and Sandra Day O'Connor, who has replaced Justice Stewart on that issue.

The Garcia case involved a municipally owned and operated transit authority in San Antonio. The transit authority challenged the authority of the Department of Labor to impose minimum wage and maximum hour provisions on its bus drivers and other employees. The district court ruled for the transit authority. It said this was a traditional governmental function and that, given the High Court's decision in National League of Cities, the federal government could not regulate these employees.

Earlier this year, the Supreme Court reversed the lower court. Writing for a majority, Justice Blackmun stated that the lower courts have failed totally in nine years to agree on a workable dividing line between what is a traditional government function and what is not a traditional government function. He said that in any event, it is a political decision and ought, therefore, to be resolved by the political process rather than by the judicial process. He concluded his opinion by stating, "the National League of Cities standard has proved unsound in principle and unworkable in practice. It is reversed and overruled."

Let me, just briefly, make several observations about where I think we are with Garcia. First, when National League of Cities was decided in 1976, NEA was not very much concerned with its direct impact. We were concerned only with what it meant for collective bargaining. We did not care really about minimum wage and maximum hour provisions because faculty and teachers are expressly exempt from coverage of the Fair Labor Standards Act. And in 1976 that's principally who we represented — faculty, teachers, and other professional employees. That is no longer the case. We now represent a substantial and growing number of support staff in public colleges and universities, and those employees, as a result of Garcia, are covered by the minimum wage-maximum hour provisions of the Fair Labor Standards Act. Clearly then, Garcia has important implications for us as a labor organization.

But what impact is Garcia likely to have on collective bargaining or, more specifically, passage of a federal collective bargaining statute? When National League of Cities was decided in 1976, there was some momentum. Many public sector unions in Washington had been working for eight years with Congress. Jimmy Carter and Walter Mondale were entering the White House, and both were committed to supporting a federal collective bargaining statute if it could be passed through Congress. Many speculate that if National League of Cities had not been decided in 1976, we might, during the Carter Administration, have achieved passage of a meaningful federal collective bargaining statute which would have given basic rights and protections to public employees across the nation.

As a matter of pure constitutional law, Garcia restores us to the position we were in during 1976. The Commerce Clause statute NEA proposed in 1976 probably would pass muster in 1985. But 1985 is not 1976. Ronald Reagan is not Jimmy Carter. The Republicans control the Senate. While it may be an overstatement to say that public sentiment in the last decade has turned anti-union, it is not an overstatement to say that there has been a perceptible shift to the right. Whether, in light of these political realities, it is unlikely that the public sector unions will, once again, embark upon an all out effort to secure a federal collective bargaining statute is a policy question I do not presume to be in a position to address today. It is a policy question that will, however, undoubtedly be addressed in the deliberative bodies of the many public sector unions that will convene in the coming months.

The policy question is not whether the public employee unions are committed to securing collective bargaining rights for every public employee in this country, nor is it whether they believe that a federal collective bargaining statute is the most effective way to do that. The answer, in most cases, to those questions is, "yes". The policy question is one of timing and approach. It is whether, in light of present political realities, public employee unions ought to devote substantial time, energy, and money to seeking passage of a collective bargaining statute in Congress, or whether they should, more appropriately, devote those resources to the state level or to other vehicles for improving the terms and conditions of employment of public employees.

Finally, let me just say one final thing about Garcia that I find particularly troubling. While I am certainly pleased with the result, this "flip-flop" by the Supreme Court on an issue as important as states' rights is hardly calculated to instill confidence in the stability of the American judicial system. This had been a remarkable constitutional zigzag. The Garcia decision in 1985 reverses the National League of Cities decision in 1976 which, in turn, reverses the Maryland v. Wirtz decision of 1968, and another zag may not be far off.

Justice Rehnquist, who wrote the majority opinion in National League of Cities, dissented in Garcia. In his brief one paragraph dissent, he concluded:

> I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, again command the support of a majority of this Court.

Justice Rehnquist may or may not be right in this particular instance, but his comment serves as a graphic reminder of a most important truth, though often ignored. The decisions of the United States Supreme Court are many times not at all based upon abstract legal theories or even absolute legal doctrines. They are instead based on people, on personalities, and on what individuals happen to be sitting on the Court at any given point in time.

In the description for this session, it says we were to address the questions, "What trends, if any, are discernible in the future?" and "Which cases are likely to have the most significant impact on campus?" In my view, if the foregoing decisions are to have any impact at all on campus — much less significant and lasting ones — the trends to which we will have to apply our discernment will much more likely be in the political arena than in the judicial arena.

XI. THE STRIKE AT YALE

A. THE UNION PERSPECTIVE
B. ADMINISTRATION PERSPECTIVE
C. A FACULTY PERSPECTIVE IN SUPPORT OF LOCAL 34
D. A FACULTY PERSPECTIVE IN SUPPORT OF THE UNIVERSITY ADMINISTRATION

THE STRIKE AT YALE
A. THE UNION PERSPECTIVE

John Wilhelm
International Vice President
New England Hotel and Restaurant
Employees International, AFL-CIO

INTRODUCTION

Many among the clerical and technical employees at Yale University have been seeking to organize a union, at least since 1967, and I'm told by a history professor who's studying the question, even longer ago than that. Our own effort by the Hotel and Restaurant Employees Union began in 1980 and was the latest of a number of previous efforts. Our International Union has represented the service and maintenance employees at Yale, our sister local, Local 35, for many, many years and there has been a history of labor strife between the University and Local 35. There were strikes between Local 35 and the University in 1968, 1971, 1974 and 1977. These were successive contract expirations, each longer than the one before, which, I believe, is probably a record of some kind that, hopefully, none of the rest of you will emulate.

It's worth noting that the University responded to the employees' efforts to unionize in exactly the same way and with exactly the same sets of tactics and the same advisors as do most American corporations. The University hired, at the outset of the most recent efforts of the employees to unionize, Connecticut's law firm, Segal, O'Connor & Canon. There ensued a prolonged and stereotypical anti-union campaign on the campus culminating in the extremely narrow majority victory in the National Labor Relations Board election in May of 1983. Following the Union's certification, the University switched law firms and hired Seyforth, Shaw, Fairweather and Geraldson, a Chicago-based firm that counts among its clients the grape growers with which the farm workers deal.

Some 91 negotiating sessions were held. A year and a half and a bitter, devisive, ten-week strike later, a first contract was signed. It is, from our point of view, an excellent contract, both in terms of its language and in its economic terms. It is one of the better first contracts that I have encountered. We're pleased with it and it's my understanding that the University is pleased with it as well which, I suppose, is the best possible result.

THE UNIVERSITY RESPONSE

I know that it is fashionable to say that somehow the Yale Administration sort of mishandled the situation and it really shouldn't have gotten like it did. With explanations like that to say that what happened at Yale is some kind of an aberration that will not recur on any kind of a noticeable or widespread basis in private colleges and universities is a mistake. I believe that such a view, to the extent that anybody holds it, may be peculiar to Harvard but I understand it's more widespread than that, I suggest that such a view is really quite wrong. The Yale Administration did exactly what most private sector colleges and universities are doing in response to efforts by employees and especially these kinds of employees to unionize. They are using exactly the same techniques and the same advisors that other private corporations use against workers in their unions. I believe that if Yale had succeeded at any point along the way in achieving some of its objectives: if it had succeeded, for example, in preventing unionization; or if it had succeeded in forcing the union leadership to recommend to the membership a weak contract; or if the administration had succeeded in breaking the strike; that would have frustrated the employees' goals.

I think actually that what happened at Yale is really the tip of an iceberg in private colleges and universities. I believe that these kinds of employees will be unionizing in much greater numbers in the next decade in private colleges and universities and if that is so, I think it might be pertinent to pose a few questions about what went on there.

VALUE JUDGMENTS

One of the questions involves a value judgment about universities and what university communities are supposed to be all about. Is it appropriate for a great American university to use all of its prestige and its moral leadership and its financial resources to discourage workers from exercising their rights? And, is it appropriate in doing that for a university to use the same techniques and the same advisors and, in effect to make common cause, with the current corporate attitude toward workers and their organizations while doing that? I am sometime seized by the apparent divergence between what some of the leaders of our educational establishments say and what they do and it's only occasionally that they bring the two together themselves.

President Bok of Harvard submits an annual report to the Board of Overseers each year on a subject he considers to be of great importance. Three or four or five years ago, it was on the legal system. In the course of that, talking about how screwed up the legal system had become and how counterproductive it had become and what a waste of resources it had become, he cited as a concrete example the time, effort and money that Harvard, his university, had spent in trying to defeat, successfully up until that point and up until now, a union just like the one we're talking about at Yale. I was struck by the absurdity of the president of the institution citing that kind of exercise and that kind of expenditure of resources against the workers on his own campus as an example of the real problems in the legal system and in labor law and then continuing to do it. So, I think the real question is, is it appropriate for universities to behave that way? But, again, everybody's answer to that is their own.

I want to pose some other questions which had to do with not whether Yale's course of conduct was appropriate, but rather with whether that course of conduct is wise. The question to be asked is whether it was in the best interest of the students and the faculty and the University as a whole.

ANTI-UNION CAMPAIGNS

First, is it wise for a university to engage in a prolonged, high powered, anti-union campaign if the major result is to raise the stakes? It is one of the characteristics, in my view, of the typical corporate anti-union campaign in this country as is presently practiced, that the stakes are greatly raised. The employees are challenged at every turn of such a campaign and they were challenged at Yale. This can be documented forever. The employees were challenged at every turn to think about whether by joining together in a union they could accomplish the things that they thought might be important. Whether it was salaries, or in the area of dental care, of which there wasn't any at Yale up until this contract, or whether in the area of promotion rights, or in any of a host of other areas, the employees were constantly asked the question: if you join together in a union can you really do any better than you're doing already? That's a fine strategy, from the employer's point of view if the employer wins in the sense of preventing unionization. But if in spite of such an effort there's a union, which is what happened at Yale, the stakes have been greatly raised by that kind of campaign.

PARTISAN BATTLES

Second, I would ask the question whether it is wise to use the tremendous prestige, moral authority and resources that a place like Yale has, to wage what is really essentially a partisan battle within the University community. The moral intellectual authority of that place is virtually endless and that is so in the mind of the workers, as well as everybody else who contemplates the University. To those of you who weren't in Connecticut during this struggle, the implication might be that somehow the University did not respond, at least in any detail in public, on the issues. Some of you may know that the University for weeks on end purchased full-page advertisements in both New Haven papers, in the Hartford paper and, occasionally, elsewhere signed with the personal signature of the President of the University laying out in great detail the University's position on salaries and fringe benefits and a whole host of other things. It was a knockdown, drag out, partisan-type fight, non-violent but a real struggle. I wonder whether, in the long run, it might not diminish the moral and intellectual authority—whether the University might not use more of its moral and intellectual capital than is wise by using those resources in a struggle of that kind. The President of the University chose to personally identify himself in the manner that I just described and in other ways with the University's precise position at the bargaining table. People on the Yale Corporation, which is what they call the Board of Trustees, people with enormous and well-earned moral authority, like Bishop Paul Moore, the Episcopal Bishop of New York, or Eleanor Holmes Norton who, I'm sure, most of you know weighed in on one side. It wasn't our side I hasten to point out, in case you wonder at the nature of a very difficult, internal, partisan battle.

Is it wise to subject the University community to so devisive a struggle? I think clearly not. I believe there's no dispute on that one point among any of us. At Yale, and I assume at other similar institutions, the community doesn't operate, it can't function without mutual trust and a willingness to work together that has to be there because there really isn't a corporate, hierarchical system of restraints that make people do things so much as there's a belief that it's important to perform one's role in the community because the purpose of the community is so important and is therefore, to be supported.

In connection with all that—because somebody might say well, you went on strike—why not arbitration? I have negotiated a good deal in the private sector and a good deal in the public sector. I've negotiated with binding arbitration as an alternative and without it, and I recognize as do all of us that there are some imperfections in binding arbitration but I wonder whether binding arbitration might not make more sense than the kinds of destruction to which I have just briefly referred. At various times, the Union proposed it or was willing to accept proposals by others for binding arbitration of all of the issues and at one point we even proposed binding arbitration by a mutually agreeable panel of three Yale faculty members. Likewise this was rejected by the Administration.

Recognizing the problems with arbitration, I wonder whether in a university community, it might not make more sense to go that route, rather than the route that we all went at Yale. In my own view, a footnote to that point would be that I don't believe the contract would be as good as it is from the point of view of the Union membership had we gone to arbitration. I believe from the point of view of the Administration, the contract would have been a better one had they been willing to submit to binding arbitration.

I want to address the statement by Associate Provost Linda Lorimer that comparable worth is not in the contract. That's a fact only if one uses an extraordinarily narrow definition of the concept of comparable worth. That's not a phrase that I have ever used because to me it's a piece of jargon that is understood by a relatively small segment of the population. But, to the extent that the concept includes things like the notion that jobs should not be paid less because they are mainly done by women, or a whole range of things that we know contribute to the underpayment of women (such as unfair promotional policies, and the lack of the kinds of policies which are now in place to which Ms. Lorimer referred and which she termed so-called women's issues), it is clearly in the contract. All of those things to me are the essence of the notion of comparable worth and I think, therefore, that those in the media who attach that tag to our efforts, really were fundamentally right. There is not the kind of a weighted point system study that some people think is necessary in order for one to be able to use that term, but the concepts are very much there and addressed in a reasonably sound way as a beginning in the settlement.

CONCLUSION

What happened to life at Yale is really probably the bottom line in all of this. I would differ with Ms. Lorimer's statement here that the withdrawal of services by the service and maintenance employees was what had the major effect. Certainly, that was noticeable. The service and maintenance employees did respect the picket line. In excess of 90% of them respected the picket line for the whole ten weeks but I think the effect was really much more fundamental and far reaching than that. Yet I have no confidence that the kinds of cautions that I have tried to note in these remarks today will be observed by other private universities in their contemplation of how to respond to the possibility of unionization by these kinds of employees. Regretfully, I'm sure that Columbia, Harvard and most private American universities will continue to respond to efforts by their employees to unionize in just the same way that Yale did and other American private corporations are doing these days. And so I raise these cautions without any particular hope that anybody would listen. I believe, however, that all of us will look back upon the results of that kind of a posture as having been extremely disastrous. I think that the fabric and the intellectual life of the institutions that we are talking about will be damaged. ...

The strike at Yale is a lesson, in my view, that ought to be studied carefully by people who are concerned about private universities because I think many private universities are going to have to decide how to deal with the same problem over the next decade. In my partisan and jaundiced view, there are much better ways to deal with it. Failing all else if people can't learn how to talk with one another perhaps even binding arbitration is preferable to that kind of destruction.

THE STRIKE AT YALE
B. ADMINISTRATION PERSPECTIVE

Linda Lorimer
Associate Provost and Acting Associate
Vice President for Human Resources
Yale University

INTRODUCTION

"I believe no useful purpose is served by performing a sociological autopsy of the strike at Yale." I share that sentiment which was stated last month by Edward Hanley, the President of the International Union representing Yale's clerical and technical workers in Local 34. But, of course, we are engaged this afternoon, if not in a sociological autopsy, then in a kind of "post-mortem" about the labor dispute at Yale.

Before we turn to that analysis, I think it might be useful if I review the composition of the Local 34 bargaining unit and provide the briefest of chronologies of the labor dispute at Yale. Then I will offer a few facts that I think were not conveyed by the press. I will rely on the faculty panelists to offer their own impressions of how the educational process was affected at Yale during the strike.

LOCAL 34: THE BARGAINING UNIT

Who is in the bargaining unit of Local 34? The answer to that question suggests, in part, one of the reasons why it was so difficult and time consuming for both parties to reach agreement. Included within the bargaining unit are the "clerical and technical" staff at Yale. I know the definitions of such terms vary widely so let me state it another way. If you were to remove the faculty and the blue collar service and maintenance workers, as well as the managerial and professional staffs (that is, those whom we consider exempt from the Fair Labor Standards Act), all of the other permanent staff at Yale who work more than twenty hours a week are encompassed in this unit.

Those approximately 2,800 employees form a wall-to-wall unit from the medical school on one side of the campus to the divinity school on the other. It includes 250 job titles: photographers, crew riggers, clerical workers, nurses aides and those working in the laboratories. Over 80% of the members of the unit are women. There are young graduates of Yale College and older women who have spent all of their adult lives working at Yale. Approximately 30% of those in the unit are supported by grant

and contracts which is a fact that complicated the negotiations from the University's perspective given the always uncertain funding for those positions.

In short, the roles and responsibilities of the members of the bargaining unit and their relationships with the schools and departments within Yale made for one of the toughest tasks in these negotiations, because we had to develop a contract, which while embracing them all, did not impose rules for some that were inappropriate for others. Time will tell how well we did.

A description of the Local 34 bargaining unit is not complete without reference to the so-called brother unit at Yale--Local 35 affiliated with the same New England Hotel and Restaurant Employees International Union. That unit which has been at Yale for many decades staffs, among other things, the physical plant and the dining halls. That unit conducted a sympathy strike in support of Local 34 during the fall. As we expected, it was the withdrawal of services by Local 35 in support of Local 34 that was most problematic in terms of the practical operation of the University during the strike.

NEGOTIATIONS CHRONOLOGY

What was the chronology? The story of Local 34 goes back a long way but from our negotiating perspective, we can pinpoint the certification of the bargaining unit in May 1983 as the origin. It was a very close election in a unit of more than 2600; the Union won by thirty-some votes.

Five months after the certification (in October of 1983), the Union first presented its demands. After a lot of procedural dickering through the fall, we got down to business in the winter. In the spring of 1984, the Union set a strike deadline and then extended that deadline to April 4th. Through round-the-clock negotiations in late March and early April 1984, we arrived at what has been termed a "partial contract." That contract included, among many other things, a union security provision in the form of a modified agency shop and promotion and transfer provisions, and provided for participation on University committees by the staff. The partial contract dealt with working conditions. It provided no bucks and no benefits. There was hope by the University that the partial contract would be the springboard to resolving quickly the remaining issues.

But negotiations dragged through the summer of 1984. A private mediator was asked by both parties to join the negotiations in late summer. A new strike deadline was set for September 26. Negotiations continued around-the-clock. However, the strike was called by the Union on September 26. In late November, what had been almost simultaneous deliberations by the respective parties gave rise to two developments: The Union decided it would return to work without a contract in early December and the University indicated that it would implement unilaterally its salary package for the first year of the contract. The Union also indicated it would go back on strike on January 19, 1985 (a few weeks into the second term) if a contract was not arrived at by that time. The negotiations were successfully concluded before that deadline.

THE STRIKE

What were those weeks of the strike like? As I said, I will leave the analysis of the educational impact to the faculty panelists, but, I do think it is important to note what was not evident from the nightly news: from the first day of the strike over 40% of the clerical and

technical unit came to work. By the end of the strike, 45% of the unit was at work. There were some places, most notably the law school, which were particularly distressed by the strike and others that carried on, frankly, with very little, if no, interruption.

Throughout the strike, there was, what I would call, "cluster picketing." At certain symbolic administrative buildings, a great deal of picketing occurred, while at other areas of the University there was no picketing. So it was literally quite possible to walk across campus and not see a picketer.

I do want to say—and I think it is a commendation of the Union leadership and the entire community—that there was no violence throughout the strike at Yale. I do not want to underestimate, by this comment the effect of the strike at Yale. It was devisive and it was extremely painful. It was particularly painful I think because Yale, like most educational institutions, is a place that has prided itself on being a community that cares about those with whom we work and on giving the extra effort to students and to research that distinguish the place. Those standards were very hard to maintain during such a strike.

THE CONTRACT

So what is notable in the contract with Local 34 that might be of interest on your campuses? First, I think that there is a set of provisions in the contract that derive particularly from Yale's role as an educational institution and a major research university. For example, a primary goal of the faculty for the University's negotiating agenda was preservation of their ability to pick the most qualified members of the clerical and technical unit without bumping provisions or seniority restraints so they could assure themselves of top-notch research groups or outstanding secretarial support. We are pleased that central to the employment processes embedded in the contract is the right of the supervisor, be it faculty or administrator, to choose the most qualified candidate for any position in the unit. Another perhaps peculiarly academic aspect of the contract derives from the flexibility it provides both to the staff and supervisors. Flexibility in work rules from one school to another was a hallmark of the institution and one of the things that we as a university very much wanted to preserve. As it turned out, neither party wanted unnecessary uniformity; thus there is no "least common denominator" principle in the contract involving working rules.

What else is notable in the contract? Although they are sprinkled thoughout the contract in no discernible pattern, I am struck by the number of provisions that we were able to incorporate in the contract that deal with "women's issues" or, more aptly perhaps, "family issues." There is a new day care committee where the clerical and technical staff will work with administrators to advise the University's day care coordinator on day care policy. We codified a six-month maternity leave policy, incorporating the benefits that we had provided in the past, but obliging as supervisors to hold open the jobs for the new mothers when they went on six month maternity leaves. We provided the same protections for those new fathers who wanted to take advantage of a leave. For employees who want to take up to two years off to raise children, there is a provision whereby they will not lose their seniority during that absence. And in recognition of the fact that many of the women currently working at Yale had left the University's employ at some time to raise a family and then returned to work, the contract includes a special provision for accrual of past employment at Yale when there was an interruption. We retained our flex-time policy, which I think is particularly useful to female employees juggling their schedules to accommodate family needs. There is also a reiteration in the contract

with Local 34 of the University's policy against sexual harassment. All of those provisions and others address, and I believe rightly so, so-called women's concerns.

THE COMPARABLE WORTH QUESTION

How did comparable worth figure then in the strike? Comparable worth—the phrase heard so much in the press during the strike—in my opinion, is not incorporated in the contract. I think that you are in as good a position as I am to judge, for I believe that it was primarily a public strategy and not a negotiating table issue. Since the unit is primarily female, any salary increase and improvement in the salary structure, of course, benefitted disportionately so-called female clerical jobs and thus, indirectly addressed the comparable worth concern that clerical salaries are generally depressed because those positions have been held in the past by women. The only two aspects of the contract that directly relate to the public discussion of comparable worth are the general level of salary increases provided for the staff and a commitment by the University to review its job classification structure.

OBSERVATIONS

What else is notable to those interested in duplicating Local 34 or avoiding such a unit? First, I think that the "grass roots" organization of this unit enhanced its appeal to many women who may not have seen themselves, historically or traditionally, as union members.

Second, it was a public campaign as much as a private strike in terms of the effect on the University. That may make it less transportable to other campuses as the novelty to the press wears off. The Union, I think, was perceptive enough to capitalize on the fact that a university's reputation is one of its key assets. Yale's basic tact, as you probably could glean from our lack of response to much in the news, was not to respond to each of the issues raised in the press, because we did not want to intensify or prolong the press coverage. Other universities may conclude that a more aggressive posture with regard to the national media is preferable.

I do not believe that Local 34 is "the" Model, but I do think the message from Yale is clear: universities have to respond to the different voice of women on the campus. They can do it at the bargaining table or they can do it elsewhere but they do not have the choice anymore <u>not</u> to respond.

THE STRIKE AT YALE
C. A FACULTY PERSPECTIVE IN SUPPORT OF LOCAL 34

Jack McKivigan
Professor of History
Yale University

INTRODUCTION

I was invited here to present a third-party perspective, that of a faculty member, on the issues of last fall's strike at Yale.

I believe that my personal experiences with that Union are somewhat typical of those of the Yale faculty as a whole. Although I ultimately became more actively identified with the cause of Local 34 than a majority of my colleagues, I nevertheless believe that the ways I became educated and sensitized about labor management issues on my campus were similar to those of most other Yale faculty members.

I first became aware of Local 34's organizing drive sometime during the 1982-83 academic year, after it had been underway for more than two years. As my interest in the economic grievances of Yale's clerical and technical staff grew, I soon became aware of Local 34's efforts to address the issue of pay discrimination against workers in occupations traditionally held by females. Although Local 34 rarely used the term "comparable worth," their goal, in fact, was similar to that of feminist organizations demanding equal pay for work of equivalent value. At Yale, the 82% female staff of administrative assistants, who ran entire departments, and laboratory technicians, who conducted experiments under very valuable grants from the federal government and private industry, earned on an average $4,000 a year less than the mostly male workers who drove the trucks and performed the maintenance services for the University. According to the Union, such salary disparities existed, not because clerical or technical jobs were less important or entailed less responsibility, but because those jobs have historically been viewed as women's work.

STRIKE ISSUES

Last fall, Yale Economics Professor, Raymond Fair, made public a statistical analysis that documented signigicant salary disparities across job rankings between women and minorities and other workers at Yale, disparities that could not be accounted for by factors such as differences in education, years of service and job responsiblity. One important reason many Yale faculty members and students came to

support Local 34 was the University Administration's refusal, in light of such studies, to cooperate in a thorough investigation of whether these pay disparities were, in fact, a product of job and pay discrimination against women and minority workers. Instead, Yale University spokespersons simply asserted that the pattern of lower pay for women workers, which comparable worth attempts to rectify, was a societal problem for which the university bore no responsibility. Although the Union's bargaining proposals to deal with this economic discrimination against women did not meet the strict standards that feminists groups have advanced in some earlier comparable worth court cases and negotiations, they nonetheless represented a significant start toward the goal of comparable worth and therefore received the endorsement of women's groups, both on campus and across the nation.

There are important noneconomic issues involved in last year's strike at Yale that won the Union much support among the faculty and student body. I remember vividly that each picket sign worn by a Local 34 striker bore the slogan "Striking for Respect." This issue became important for the Union as a result of the Yale Administration's bitter fight to avoid giving up any of its control over clerical and technical workers. Yale fought these workers at every step. First, trying to prevent a union election, then showering the workers with anti-union propaganda and finally, hiring the Chicago-based, law firm of Seyforth, Shaw, Fairweather and Geraldson. In contrast, Local 34 adopted, from the outset of its drive, a remarkable, grass roots, democratic structure. The Union's agenda came from its members and the high degree of rank and file participation in decision making resulted in a spirit of solidarity among the workers which allowed them to endure enormous economic hardships while away from their jobs for ten weeks.

For someone like myself, I will confess, who shared the view that organized labor had declined in recent years, partially as a consequence of its bureaucratic, even autocratic, power structure, the experience of observing the democratic nature of Local 34 was indeed heartening. This Union's commitment to winning for the workers a voice in the running of their workplace and the Administration's total opposition to such a concept, persuaded a wide segment of the Yale faculty, including myself, to endorse Local 34's organizing drive.

THE NEGOTIATIONS PROCESS

In the spring of 1983, Local 34 won the right to bargain for Yale's 2600 clerical and technical workers in a National Labor Relations Board certification election. Following that victory, the Administration pledged to negotiate, in good faith, with the Union. What followed, however, suggested a different strategy. For the next five months, the University's chief negotiator dickered with the Union representatives over such details as the place and time for negotiation sessions. Concerned at the lack of progress, faculty members petitioned both sides to allow independent faculty observers to attend negotiating meetings. The Union accepted. The Administration refused. Compelled to attend negotiations as the Union's official guests, faculty members were appalled at the indifference and condensation that the Administration negotiating team brought to that task. The stark contrast between the Administration's public posture of reasonableness and its private posture of intractability led some 250 faculty members to petition both sides to agree to binding arbitration. Once again, the Union accepted, while the Administration refused. A paralyzing strike seemed inevitable in March 1984.

Whatever else it did, the strategy of delay won the Administration few allies. As the months passed, more and more pressure mounted from students, faculty, community leaders, and Connecticut legislators, all of

whom urged the Administration to accept binding arbitration or negotiate a settlement. Finally, just eight days before the March strike deadline, the Administration began to negotiate in earnest. In an effort to avoid the disastrous consequences of a strike, Local 34 twice postponed its strike deadline and then agreed, on April 5th, to a partial settlement. This settlement granted the Union recognition and codified agreements in areas such as grievance procedures but it left unresolved the economic issues which were at the heart of Local 34's contract proposals.

Despite a significant change in the University's negotiating team, contract negotiations returned to their former stalemate over the summer of 1984 as the Administration rejected Local 34's compromised proposals and insisted that its own proposals, which did improve salaries slightly but ignored such issues as job security and pensions, were nonnegotiable untimatums. Once again, faculty and others urged the Administration to accept binding arbitration which many nonprofit, education institutions have used to resolve labor disputes. The Administration and the Yale Corporation, ignoring the advice of experts from its own law school, rejected arbitration. They also rejected the Union's offer of nonbinding factfinding and then insisted that they could not negotiate any further on the amount of their financial package. Having publicly dug in their heels, the Yale Administration was left with little room to compromise. The result was a long strike that tore apart the Yale campus from September 1984 to January 1985.

"BUSINESS AS USUAL"

On the eve of the strike, the University promised that it would be business as usual at Yale with or without the clerical and technical workers. The withdrawal of the bulk of the clerical/technical services, as well as those of the unionized maintenance and service workers who had honored Local 34's picket lines reduced university operations to a bare minimum. Closed dining halls and gym facilities, harried administrators handling phones and the mail, and a paperwork backlog that delayed important bureaucratic reports, not to mention scholarly production for months, attested to the fact that it was not business as usual during the strike. Furthermore, professors, such as myself, who refused to habituate their students to the practice of crossing picket lines, moved more than 400 classes off campus, thanks to the willingness of local churches, theaters and social organizations to provide alternate teaching sites. In addition to normal strike activities, union members and campus supporters engaged in a series of activities that drew inspiration from and reinforced the aura of struggle for social and economic justice. These included mass meetings and rallies, petitions and press conferences, sit-ins and fundraisers. Particularly impressive were two episodes of civil disobedience in which hundreds of strikers and supporters blocked campus streets to protest Yale's refusal to negotiate seriously. The second arrest involving 434 people was joined by the long-time civil rights leader, Bayard Rustin, and endorsed beforehand in a stirring address by Ralph Abernathy.

Just before the University's Christmas recess last year, Local 34 and the 1,000 maintenance service workers of their sister Local 35, who had faithfully honored the picket lines, returned to work but at that time they announced their intention to walk out again in January if they had not reached a contract. This "home for the holidays" strategy frustrated the University's hope to starve Union members back to work. Negotiations resumed while Local 34 and 35 remained on the job.

In January, the Administration was faced with a choice between reaching a settlement with the unions or coping with another semester of chaos and disruption when both unions would return to the picket lines.

Within just two weeks in mid-January, the University and both campus unions were able to hammer out unresolved contract issues and settle without the need for a renewed strike.

YALE'S IMAGE: A PROSPECTIVE LOOK

Yale's highly prized and carefully cultivated liberal image did not bear up well all during the course of the strike. But, if that conflict undermined the harmony of the Yale community, it also provided a remarkable glimpse of how labor, minorities and women's organizations might effectively chart their course in these difficult times; that is, moving together in a united fashion. Thus, Yale University, perhaps in spite of its administrators, remained a center of enlightened thought during the strike.

I would like to end on a conciliatory and hopeful note. I believe that Yale also can emerge a winner from this bitter labor dispute if it embraces the principles of its settlement with Local 34. Today, the University has the opportunity to take a leading role in solving one of the pressing social problems of our times. By living up to the new contract, Yale can become a partner with Local 34, providing dignity, wage comparability and power over their working lives to the traditionally under-appreciated, and under-valued female clerical and technical workers. If Yale is willing to undertake this role, it can quickly resume its historic position in the vanguard of progressive education in this nation.

THE STRIKE AT YALE
D. A FACULTY PERSPECTIVE IN SUPPORT OF THE UNIVERSITY ADMINISTRATION

Donald Kagan
Professor of History
Yale University

INTRODUCTION

I am an ordinary faculty member but the moral dice in these discussions are so loaded that I hope you'll allow me a minimal autobiographical statement as a disclaimer. I did not grow up in the East Bronx but I grew up in the Brownsville Section of Brooklyn and both of my parents were manual workers, both of them belonged to unions and I grew up and knew all the union songs and to this day, can give you at least two verses of the "Union Maid," should anybody want that. I mention that because it's so easy to be put into a little corner and identified in many ways. I regard myself as not unfriendly to unions and try to look upon them with the same objective eye that I try to look at other phenomena in our society. I think unions have their place and just precisely what it is and where it is needs to be determined by circumstances.

Now let me begin by focusing on the two questions that seem to me to explain why I am here namely, as a faculty member who did not join in support for the Union as some of the others did, and what do I think was the effect of the strike on the Yale students, on the Yale faculty and on Yale in a broader sense. Having done that I would like to say a little bit about some of the points that Mr. Wilhelm raised because I think they are very important and they deal with the question: what is the correct role of a university, private or public, in dealing with the problem of labor relations on its own campus?

THE IMPACT ON THE STUDENTS

First, what was the effect of the strike on the students? I do have a certain qualification to talk about this strike and that is I lived through the last one too. In 1977, we had a really bad strike that was about as long as this one. It was a strike by the blue collar workers not of the white collar workers. I put that as background for my understanding of the current strike because I think it provides a certain depth to our perceptions. Both strikes were the same in this respect, that they did very serious damage to the social life of the students of Yale because the residential dining halls are the center of social life for

the students. It is not merely that mealtimes are great times to get together, talk and meet, but the dining halls are used for a variety of social and other functions. To my mind, based upon a lot of conversation and a lot of observation, that was the heaviest burden that the undergraduates had to bear and it was very unpleasant for them.

As for what you think of as the more fundamental role of students at a university, namely, attending classes and doing their work, it is my impression that on both occasions there was very little trouble for them. All classes met. The Union, as I understand it, did not ask any teachers not to meet their classes or students not to go to their classes. Some of the most vigorous supporters of the Union on the faculty were very vigorous in meeting their obligations as teachers. Some hundreds of classes met off campus which meant taking a few steps this way or that way. But, the overwhelming majority of teachers stayed where they were and the overwhelming majority of classes stayed where they were.

I taught two classes that term. I had about 135 students all together and I can simply report to you that not one student at any time came to me and asked me would I consider moving the class off campus. So that was not an issue for me. That, by the way, was not a unique experience as some of my colleagues passed on to me.

I think people simply didn't want to be bothered and wanted to live their lives in the usual way. My own impression was that apart from the discomfort that the students felt from the closing of the dining halls and some of the other things that were deprived, they mostly did not take part. Some students did - vigorously and it dominated their lives and it had both the pluses and the minuses. The minuses were that they stopped thinking about academic subjects and the pluses were that they became powerfully, emotionally and, in certain ways, very helpfully involved in the thing that meant a great deal to them. All I would say, to put that into perspective, is that that is a characteristic of Yale students responding to extracurricular activities at Yale. The typical member of the Yale Daily News does not do very much academic work. He spends all his time hacking away at the Yale Daily News and he thinks it is a good trade. I do not want to minimize what happened but I do want to put it into perspective and I do want to make it clear to you that, in my view, it represented a very sharp minority of the students who were very powerfully involved.

THE IMPACT ON THE FACULTY

Let me turn to the faculty. How were they affected by the strike? Again, let us begin by saying they were, and it was negative. Nobody enjoyed it and it was an unpleasant experience for all. And again, all I am talking about is the faculty of arts and sciences. Yale has a variety of faculties. I really don't know what was happening in the other ones. Here, the thing that was most surprising to me was that the absence of those clerical and other workers, and as Ms. Lorimer told you that amounted to something between 55 and 60 percent of the work force, turned out to have much less effect on the way we did our business than any of us thought. This is a very worrying fact and I kept hearing it from all over the place. In various areas, people could not understand why it was they were not suffering more in terms of being able to get their work done. The faculty, as far as I can see universally, met its teaching obligations one place or another.

Now in understanding how the faculty felt about these matters, I find it necessary to think about three different groups of faculty. I cannot say what the numbers were like but it was maybe equivalent in numbers, but I am not sure. One was like Mr. McKivigan, committed to

the Union's cause and worked very hard to move it forward in a variety of ways and I am sure that that had many positive elements for them as well as the negative ones. A second group felt strongly that the Union was wrong and that it should not have what it wanted. The third group felt that they did not want to know whether the Union was right or wrong but that the faculty should not get involved in what they thought of as standard labor negotiation because they thought it inappropriate. The second and third groups formed a body that ended up arguing against the faculty that wanted to support the Union. In my opinion, they were the minority of the faculty of arts and sciences. The majority didn't give a damn, so far as one could see, because neither did they express a point of view, nor did they show up at the meetings when these issues were discussed. I think that is another thing that should be understood.

The faculty was given a very considerable opportunity to discuss the pros and cons of all the issues surrounding this strike in various ways. Both the Administration and the Union communicated to the faculty in writing on many occasions. There were several faculty meetings in which the President or the Provost or both were asked questions by the faculty and responded for some considerable time. On two occasions, the faculty members sympathetic to the cause of the Union put onto the agenda of a Yale College Faculty meeting a motion of one sort or another which we understood was intended to be supportive of the Union's position and critical of the Administration's position. On each occasion it led to a very thorough, long and, in some cases, impassioned discussion, concluding with a vote. On both occasions, the vote of the faculty was not to support the proposal which would have endorsed the Union's position at that time. The first of those votes was quite close, the second one a little bit less close. On both occasions, though they were very large faculty meetings by Yale standards, the majority of the faculty was not there.

The assertion that the Yale Administration acted pretty much like a corporation and basically was interested in busting the Union comes as quite a surprise to me. From an objective point of view, standing on the outside and watching it, if that is what they were trying to do, they really should have been fired because they were thoroughly incompetent in doing that. If I were engaged in a union-busting activity, I would not have done some of the following things that the Yale Administration did. First, I want to emphasize what an important issue it was for some of us that the people in the unit at issue barely voted to have a union. If you include those people who didn't vote, a majority of them did not express a positive vote for the Union. A majority of those voting did and that's legal and that's fine but we know that a very large number of these people did not wish to be in the Union. That's a very important fact because it affects what the University did as opposed to what it might have done.

CONCLUSION

In the spring 1984, the decision was made for the University to sign an agreement with the Union which effectively, put the Union in place. As I understand these things, had they failed to do that, in a few months it would have been open to people who had a right to do so, to make a motion to decertify the Union. And so, Yale did not take advantage of that. Anyway, if they were trying to bust the Union, they should not have signed any kind of a contract because that would have left it open for people to try to decertify the Union. Moreover, they then signed a contract which meant that there would be no strike at a time that was late in the year. If you want to force an unpleasant strike on a union at a time when it is least able to enjoy it, that is the time to do it. They signed a contract without any numbers leaving themselves in a situation

that if a strike should come, it would come at a time most disadvantageous for the University. I can only say that if that was their carefully, calculated advice from those high priced firms, they should fire the firm and fire the Yale Administration.

Time does not allow further discussion on more of the issues and especially as to what is the appropriate role of the faculty and the University in dealing with labor negotiations. However, I wanted to indicate that I think there is another way of looking at it from what you have heard.